153 U.S. 287

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 683.

MILTON L. BAER, PLAINTIFF IN ERROR,

vs.

MORAN BROTHERS COMPANY (A CORPORATION).

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED DECEMBER 11, 1891.

(14,945.)

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INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from superior court of King county	1	1
Complaint	1	1
Demurrer	10	8
Order continuing hearing of demurrer	11	8
Order taking demurrer under advisement	12	9
Order sustaining demurrer	13	9
Judgment	14	9
Notice of appeal	15	10
Clerk's certificate	16	10
Order taking cause under advisement	17	11
Opinion	18	11
Judgment	28	16
Petition for writ of error	29	16
Order allowing writ of error	32	18
Bond	33	18
Writ of error	35	19
Citation and service	37	20
Clerk's certificate	38	21

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 19, 1894.

a MILTON L. BAER, Appellant,
—
MORAN BROTHERS COMPANY (a Corporation), Appellee.

From the superior court of King county to the supreme court of the State of Washington.

1 In the Superior Court of King County, Washington.

MILTON L. BAER, Plaintiff,
vs.
MORAN BROTHERS COMPANY, a Corporation, Defendant.
No. 8440. Complaint.

Plaintiff complains and alleges—

I.

That plaintiff has a valid, subsisting interest in and right to the possession of the following-described premises, situated in King county, Washington, to wit:

Beginning at a point 688 feet south and 660 feet west of the east one-fourth post of sec. 6, t'p 24 N., R. 4 E., W. M., thence west 150 feet, thence south 210 feet, thence east 150 feet, thence north 210 feet to place of beginning, being the premises covered by Moran Brothers Company's foundry and machine shops.

II.

That the defendant corporation is in possession thereof and unlawfully withholds the same from him.

III.

That the nature of plaintiff's estate, claim, or title to the said premises is as follows:

2 That the Congress of the United States passed an act entitled "An act for the relief of Thomas B. Valentine," which was by the President of the United States approved on the 5th day of April, 1872, and which said act was in words and figures following:

"An act for the relief of Thomas B. Valentine.

Be it enacted by the Senate and House of Representatives in Congress assembled:

That the ninth circuit court of the United States of California, be and hereby is authorized and required to hear and decide upon the merits of the claim of Thomas B. Valentine claiming title under a Mexican grant to Juan Miranda, to a place called the Rancho Arroye de San Antonio, situate in the county of Sonoma and State of California, in the same manner and with the same jurisdiction, as if the claim to the said tract of land had been duly presented to the board of land commissioners under the provisions of the act entitled

'An act to ascertain and settle the private land claims in the State of California,' approved March third, eighteen hundred and fifty-one, and an appeal had been duly taken from their decision to the district court of California, by the said Thomas B. Valentine.

SEC. 2. That on the said hearing and testimony heretofore taken before said board of commissioners, in relation to said claim, on behalf of the said claimant, or of the United States, may be read, subject to all just exceptions to its competency, and additional testimony, on either part, may be taken under the order and direction of said circuit court, as to the validity and extent of said claim.

SEC. 3. That an appeal shall be taken from the final decision and decree of the said circuit court to the Supreme Court of the United States by either party, in accordance with the provisions of the tenth section of said act of March third, eighteen hundred and fifty-one, within six months after the rendition of such final decision, and a decree under the provisions of this act, in favor of said claim, shall not affect, any adverse right or title to the lands described in said decree; but in lieu thereof the claimant, or his legal representatives, may select, and shall be allowed patents for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and, if unsurveyed when taken, to conform, when surveyed, to the general system of United States land surveys, and the Commissioner of the General
3 Land Office, under the direction of the Secretary of the Interior, shall be authorized to issue scrip, in legal subdivisions to the said Valentine, or his legal representatives, in accordance with the provisions of this act: Provided, that no decree in favor of said Valentine shall be executed nor be of any force or effect against any person or persons; nor shall land scrip or patents issue as hereinbefore provided unless the said Valentine shall first execute and deliver to the Commissioner of the General Land Office, a deed conveying to the United States all his right, title, and interest to the lands covered by the Miranda grant."

2. That in pursuance of said act the ninth circuit court of the United States of California did hear and decide upon its merits the said claim of Thomas B. Valentine, and on the 6th day of January, 1873, did enter its decree in favor of said claim.

3. That thereafter, in pursuance of said act, an appeal was taken from the final decree of said circuit court to the Supreme Court of the United States, and thereafter, to wit, on the 6th day of January, 1874, the Supreme Court of the United States duly entered its decree in favor of said claim.

4. That thereafter, in pursuance of said act, the said Thomas B. Valentine did execute and deliver to the Commissioner of the General Land Office a deed conveying to the United States all his right, title, and interest to the lands covered by the said Miranda grant.

5. That thereafter, in pursuance of said act and of the decree of the said Supreme Court of the United States, the Commissioner of the General Land Office, under the direction of the Secretary of the

Interior, did issue to said Valentine, in accordance with the provisions of said act, scrip in legal subdivisions.

6. That among the pieces of scrip so issued by said Commissioner was one forty-acre piece designated and numbered by said Commissioner as E No. 199, which said piece of scrip was in words and figures following:

Special certificate of location. E 199, D. Act of April 5th, 1872 (17 Stats., p. 649).

Claim of Thomas B. Valentine.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 28th*, 1874.

Whereas by act of Congress approved April 5th, 1872, entitled "An act for the relief of Thomas B. Valentine," it was enacted that the ninth circuit court of the United States of California be, and hereby is, authorized and required to hear and decide, upon the merits, the claim of Thomas B. Valentine, claiming title under the Mexican grant to Juan Miranda to a place called the Rancho
4 Aroyo de San Antonio, situate in the county of Sonoma and State of California, in the same manner and with the same jurisdiction as if the claim to the said tract of land had been duly presented to the board of land commissioners, under the provisions of an act entitled "An act to ascertain and settle the private land claims in the State of California," approved March third, eighteen hundred and fifty-one, and an appeal had been duly taken from their decision to the district court of California by the said Thomas B. Valentine;

That on the said hearing any testimony heretofore taken before the said board of commissioners in relation to said claim on behalf of the said claimant or of the United States may be read, subject to all just exceptions to its competency, and additional testimony on either part may be taken under the order and direction of said circuit court as to the validity and extent of said claim;

That an appeal shall be taken from the final decision and decree of said circuit court to the Supreme Court of the United States by either party, in accordance with the provisions of the tenth section of said act of March third, eighteen hundred and fifty-one, within six months after the rendition of such final decision, and a decree under the provisions of this act in favor of said claim shall not affect any adverse right or title to the lands described in said decree, but in lieu thereof the claimant or his legal representative may select and shall be allowed patents for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and, if unsurveyed when taken, to conform, when surveyed, to the general system of the United States land surveys, and the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, shall be

authorized to issue scrip, in legal subdivisions, to the said Valentine or his legal representatives in accordance with the provisions of this act: Provided, that no decree in favor of said Valentine shall be executed nor be of any force or effect against any person or persons, nor shall land scrip or patents issue as hereinbefore provided unless the said Valentine shall first execute and deliver to the Commissioner of the General Land Office a deed conveying to the United States all his right, title, and interest to the lands covered by the said Miranda grant;

And whereas the said Thomas B. Valentine did on the 5th day of June, A. D. 1872, pursuant to the act aforesaid, file in the said circuit court of the United States a petition praying the said court to hear and decide upon the merits of his claim to the said Rancho Arroyo de San Antonio, whereupon the said court, on the 6th day of January, A. D. 1873, in the cause entitled Thomas B. Valentine *vs.* The United States, rendered the following decree:

5 In this case, on hearing the proofs and allegations, it is ordered, adjudged and decreed that the said claim of the petitioner is valid, and that the same be, and hereby is, confirmed; but this decree and confirmation are hereby made subject to the restrictions and limitations prescribed in the act of Congress entitled "An act for the relief of Thomas B. Valentine," approved April 5th, 1872.

The land of which confirmation is made is the same which was granted by Manuel Micheltorena, in the name of the Mexican government, to Juan Miranda, on the 8th day of October, 1844, and on which he resided in his lifetime, and is known by the name of Rancho Aroyo de San Antonio, and bounded by the laguna and ar-oyo of the same name and the pass and estero of Petaluma, and is in extent three square leagues, if that quantity is to be found within the exterior boundaries, and no more; and if less quantity is included in said boundaries, then said lesser quantity is confirmed.

LORENZO SAWYER,
Circuit Judge.

Which said decree was affirmed by the Supreme Court of the United States on the 6th day of January, A. D. 1874, as follows:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of California, Greeting:

Whereas lately, in the circuit court of the United States for the district of California, before you or some of you, in a cause between Thomas B. Valentine, complainant, and The United States, defendant, wherein the decree of the said circuit court, entered in said cause on the 6th day of January, A. D. 1873, is in the following words, viz:

"In this case, on hearing the proofs and allegations, it is ordered,

adjudged, and decreed that the said claim of the petitioner is valid, and that the same be, and hereby is, confirmed; but this decree and confirmation are hereby made subject to the restrictions and limitations prescribed in the act of Congress entitled 'An act for the relief of Thomas B. Valentine,' approved April 5th, 1872. The land of which confirmation is made is the same which was granted by Manuel Micheltorena, in the name of the Mexican government, to Juan Miranda on the 8th day of October, 1844, and on which he resided in his lifetime, and is known by the name of Rancho Arroyo de San Antonio, and bounded by the laguna and ar-oyo of the same name and the pass and estero of Petalauma, and is in extent three square leagues, if that quantity is to be found within the exterior boundaries, and no more; and if a less quantity is included
6 in said boundaries, then said lesser quantity is confirmed," as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such cases made and provided, fully and at large appears; and whereas, in the present term of October, in the year of our Lord one thousand eight hundred and seventy-three, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and on the motion of Mr. Assistant Attorney General Goforth, of counsel for the appellants, it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed. 6th January, 1874.

You, therefore, are hereby commanded that such proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Nathan Clifford, senior associate justice of said Supreme Court, the 7th day of January, in the year of our Lord one thousand eight hundred and seventy-four.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

And whereas it appears that the tract of land described in said decree confirmed as aforesaid contains an area of 13,316 acres or three square leagues of land:

And whereas, pursuant to the aforesaid acts of Congress, there has been deposited in the General Land Office a deed bearing date December 17, A. D. 1873, by which said Thomas B. Valentine and Maria A., his wife, conveyed to the United States all their right, title, and interest in said Rancho Arroyo de San Antonio, above described, which said deed was recorded on the 22nd day of January, A. D. 1874, in the office of the recorder of deeds for the county of Sonoma, State of California:

Now, therefore, be it known that on the surrender of this certificate to the register of any land office of the United States the said Thomas B. Valentine or his legal representatives shall be entitled to enter in part satisfaction of said claim the quantity of forty acres of land upon any of the unoccupied and unappropriated public

lands of the United States not mineral, and in tracts not less than the subdivisions provided for in the United States Land Laws, and unsurveyed when taken, to conform when surveyed to the general system of the United States land surveys.

By direction of the Secretary of the Interior.

WILLIS DRUMMOND,
Commissioner.

7 7. That thereafter, to wit, on the 12th day of June, A. D. 1875, the said Thomas B. Valentine, for a valuable consideration, duly sold and assigned the said piece of scrip, E No. 199, to H. S. Ledyard and F. P. F. Temple by his instrument in writing and under seal and duly acknowledged before a notary public, and therein and thereby authorized the said H. S. Ledyard and F. P. F. Temple and their assigns or legal representatives to locate the same and receive a patent for the lands so located.

8. That thereafter, to wit, on the 3rd day of March, A. D. 1883, one George E. Long, the duly appointed assignee in bankruptcy of said F. P. F. Temple, for a valuable consideration, duly sold and assigned the interest of said F. P. F. Temple in said piece of scrip, E No. 199, to one Ivar A. Weid by his instrument in writing and under seal and duly acknowledged before a notary public, and therein and thereby authorized the said Ivar A. Weid and his assigns and legal representatives to locate the same and receive a patent for the lands so located.

9. That thereafter, to wit, on the 22nd day of March, A. D. 1883, the said H. S. Ledyard, for a valuable consideration, duly sold and assigned his interest in said piece of scrip, E No. 199, to said Ivar A. Weid by his instrument in writing and under seal and duly acknowledged before a notary public, and therein and thereby authorized the said Ivar A. Weid or his legal representatives to locate the same and to receive a patent for the land so located.

10. That thereafter, to wit, on the 3rd day of April, A. D. 1883, the said Ivar A. Weid, for a valuable consideration, duly sold and assigned the said piece of scrip, E No. 199, to Milton L. Baer, this plaintiff, by his instrument in writing and under seal and duly acknowledged before a notary public, and therein and thereby authorized the said Milton L. Baer to locate the same and to receive a patent for the land so located, and that the said Milton L. Baer, the plaintiff herein, was on the said 23rd day of September, 1889, the owner and holder of said scrip and the legal representative of said Thomas B. Valentine and authorized and empowered to locate said scrip and to receive a patent for the land so located.

11. That thereafter, to wit, on the 23rd day of September, 1889, this plaintiff, as assignee and legal representative of said Thomas B. Valentine and as owner and holder of said scrip numbered E No. 199, duly selected the following-described tract of unsurveyed land, to wit: Beginning at a point 160 rods south of the northeast corner of section 6, t'p 24 N., R. 4 E., W. M., thence west 80 rods, thence south 80 rods, thence east 80 rods, thence north 80 rods to the place of beginning, containing 40 acres, which said tract of land when

surveyed will conform to the general system of United States
8 land surveys and will be known and designated as the south-
east quarter of the northeast quarter of section 6, tp 24 N.,
R. 4 E., W. M.

12. That this plaintiff selected the said tract of land in the manner following, to wit: On the said 23rd day of September, 1889, this plaintiff filed with the register and receiver of the United States land office at Seattle, Washington, a notification that in pursuance of said act of Congress the said plaintiff had selected the said tract of land, describing it, together with an affidavit of this plaintiff, to the effect that the said tract of land was not mineral in character, and at the same time and place the said plaintiff filed with the said register and receiver of said United States land office the said piece of scrip numbered E No. 199 for cancellation, and tendered to said receiver the sum of two dollars, being the amount of fees allowed by law to the register and receiver of the United States land offices in the Territory of Washington, on the entry of 40 acres of land with Valentine scrip.

13. That the said tract of land so selected by said plaintiff was at the time of its selection by said plaintiff unoccupied and unappropriated public land of the United States not mineral, in this, that the said tract of land was situated in the Territory of Washington, was a portion of the tide flats, covered and uncovered by the ebb and flow of the tide, was uncovered at ordinary low tide and was covered with water at ordinary high tide, and had never been set apart by the United States for any particular use; that the said tract or any portion thereof was not in the possession of any person claiming or intending to claim any title thereto under or in pursuance of any statute or treaty of the United States, and the said tracts were not chiefly or at all valuable for mineral, and that the Indian title of occupancy thereto had been extinguished.

IV.

That the tract of land in possession of said defendant corporation and so unlawfully withheld from the plaintiff is a portion of the tract of land selected by plaintiff, as in the third paragraph hereof is set out.

V.

That the value of the said tract of land so unlawfully withheld from the plaintiff by the defendant is $25,000.00.

Wherefore the plaintiff demands judgment for the possession of the said premises and for $10,000.00, the plaintiff's damages for the withholding of the same, together with his costs.

JNO. S. CROCKETT,
BERIAH BROWN, JR.,
Attorneys for Plaintiff.

9 STATE OF WASHINGTON, } ss:
County of King, }

Milton L. Baer, being first duly sworn, on oath says that he is the Milton L. Baer, plaintiff, in the above-entitled action; that he has heard the foregoing complaint read, knows the contents thereof, and believes the same to be true.

M. L. BAER.
[SEAL.] MILTON L. BAER.

Subscribed and sworn to before me this 26th day of May, 1890.

GEO. H. FORTSON,
Notary Public in and for the State of Washington,
Residing at Seattle, Washington.

(Indorsed:) Filed May 27, 1890. M. M. Holmes, clerk.

10 In the Superior Court of King, State of Washington.

MILTON L. BAER, Plaintiff, } No. 8440. Demurrer.
vs.
MORAN BROTHERS, a Corporation, Defendant. }

Comes now the defendant, by Struve, Haines, & McMicken, its attorneys, and demurs to the complaint of the plaintiff on file herein because the same does not state facts sufficient to constitute a cause of action.

STRUVE, HAINES & McMICKEN,
Attorneys for Defendant.

Service by copy is hereby acknowledged this 14th day of June, 1890.

BERIAH BROWN, JR.,
Attorney for Plaintiff.

(Indorsed:) Filed June 14th, 1890. M. M. Holmes, clerk.

11 In the Superior Court of King County, State of Washington.

SATURDAY, *July* 5, 1890.

MILTON L. BAER } Continued.
vs.
MORAN BROTHERS. }

Ordered by the court that the hearing of the demurrer in this cause be, and the same is hereby, continued until 9.30 a. m. Saturday, July 12, 1890.

J. A. STRATTON, *Judge.*

Entered Journal 6, page 585.

12 In the Superior Court of King County, State of Washington.

SATURDAY, *July* 12, 1890.

MILTON L. BAER *vs.* MORAN BROS. } No. 8440. Demurrer Reserved.

Now, on this day, this cause comes on for hearing on defendants' demurrer to the complaint herein, and the court, not being fully advised, takes time.

J. A. STRATTON, *Judge.*

Entered Journal 9, page 26.

13 In the Superior Court of King County, State of Washington.

TUESDAY, *September* 2, 1890.

MILTON L. BAER *vs.* MORAN BROS. COMPANY (a Corporation). } No. 8440. Demurrer Sustained.

Now, on this day, this cause comes on for hearing on defendants' demurrer to the complaint herein, and, after argument of counsel and being fully advised in the premises, said demurrer is sustained by the court.

To which ruling of the court plaintiff excepts and his exception is allowed.

J. A. STRATTON, *Judge.*

Entered Journal 9, page 199.

14 In the Superior Court of King County, State of Washington.

FRIDAY, *September* 12, 1890.

MILTON L. BAER, Plaintiff, *vs.* PETER MORAN *et al.*, Defendant-. } No. 8440. Judgment.

Whereas defendants in the above-entitled action filed a general demurrer to the complaint herein, the same was sustained by the court on the 2nd day of September, 1890; and whereas plaintiff declines to amend his complaint and asks for final judgment:

Now, therefore, to wit, September 2nd, 1890, upon due consideration, the court being fully advised in the premises, it is considered, ordered, decreed, and adjudged that the restraining order issued herein be discharged and dissolved, the complaint dismissed, and the defendants herein be hence dismissed with their costs.

J. A. STRATTON, *Judge.*

Entered Journal 9, page 240.

15 In the Superior Court of King County, State of Washington.

FRIDAY, *December* 5, 1890.

MILTON L. BAER, Plaintiff,
vs.
MORAN BROTHERS COMPANY, a Corporation, Defendant.
No. 8440. Notice of Appeal.

To Moran Brothers Company, a corporation, and to J. C. Haines, Esq., its attorney:

You will please take notice that the plaintiff above named appeals the above-entitled cause to the supreme court of the State of Washington. This appeal is taken from the judgment of the court made and entered in the above-entitled cause on the 12th day of September, 1890.

BERIAH BROWN, JR.,
Attorney for Plaintiff.

Service of the above accepted this 5th day of December, 1890.

J. C. HAINES,
Attorney for Def't.

J. A. STRATTON, *Judge.*

Entered Journal 12, page 508.

16 In the Superior Court of King County, State of Washington.

MILTON L. BAER, Plaintiff,
vs.
MORAN BROTHERS COMPANY, a Corporation.
No. 8440.

STATE OF WASHINGTON, *County of King,* } *ss:*

I, W. B. Spencer, county clerk of King county and *ex officio* clerk of the superior court of said county, do hereby certify that the foregoing is a full, true, and correct transcript of so much of the record in the above-entitled cause as I am by statute required to transmit to the supreme court.

In witness whereof I have hereunto set my hand — the seal of said superior court this 12th day of March, 1891.

[Seal of Superior Court of King County.]

W. B. SPENCER, *Clerk.*

Endorsed: No. 188. Filed March 25, 1891. C. S. Reinhart, clerk.

17 In the Supreme Court of the State of Washington.

THURSDAY, *June* 4, 1891.

MILTON L. BAER, Appellant,
vs.
MORAN BROS. CO., Appellee. } No. 188.

This cause coming on regularly to be heard by the court on the transcript of the record of the superior court of King county and upon the argument of counsel for appellant, and the appellee not being present, but having signified his willingness to submit the matter on briefs by telegram, it was so submitted and taken under advisement.

Entered Journal, Record No. 1, page 362.

18 MILTON L. BAER
vs.
MORAN BROTHERS COMPANY, a Corporation. } No. 188. Filed Aug. 1, 1891. Appeal from King County.

The appellant brought ejectment for the following-described real estate in King county, viz: Beginning at a point 688 feet south and 660 feet west of the east one-quarter post of section six, township twenty-four north, range four east, W. M., thence west one hundred and fifty feet; thence south two hundred and ten feet; thence east one hundred and fifty feet; thence north two hundred and ten feet to place of beginning, being the premises covered by Moran Brothers Company's foundry and machine shop.

The complaint showed the plaintiff's ownership of Valentine scrip E No. 199 for forty acres, and that on the 23rd day of September, 1889, he "duly selected the following-described tract of unsurveyed land for location thereunder, to wit: Beginning at a point one hundred and sixty rods south of the northeast corner of section six, township twenty-four north, range four east, W. M., thence west eighty rods; thence south eighty rods; thence east eighty rods; thence north eighty rods to the place of beginning, containing forty acres; which said tract of land when surveyed will conform to the general system of the United States land surveys, and will
19 be known and designated as the northeast quarter of southeast quarter of section six, township twenty-four north, range four east, W. M."

The complaint then proceeds:

"12. That this plaintiff selected the said tract of land in the manner following, to wit: On the said 23rd day of September, 1889, this plaintiff filed with the register and receiver of the United States land office at Seattle, Washington, a notification that, in pursuance of the act of Congress approved April 5th, 1872, the said plaintiff had selected the said tract of land, describing it, together with an affidavit of this plaintiff to the effect that the said tract of land was not mineral in character, and at the said time and place the said plaintiff filed with the said register and receiver of said United States land office the said piece of scrip, numbered E No. 199, for cancel-

lation, and tendered to said receiver the sum of two dollars, being the amount of fees allowed by law to the register and receiver of United States land officers in the Territory of Washington, on the entry of forty acres of land with Valentine scrip.

13. That the said tract of land so selected by said plaintiff was, at the time of its selection by said plaintiff, unoccupied and unappropriated public land of the United States, not mineral, in this, that the said tract of land was situated in the Territory of Washington, was a portion of the tide flats, was covered and uncovered by the flow and ebb of the tide, uncovered at ordinary low tide, and was covered with water at ordinary high tide, and had never been set apart by the United States for any particular use; that the said tract or any portion thereof was not in the possession of any person claiming or intending to claim any title thereto under or in pursuance of any statute or treaty of the United States, and the said tracts were not chiefly or at all valuable for mineral, and that the Indian right of occupancy thereto had been extinguished."

A general demurrer to the complaint was sustained in the court below, and on the plaintiff's refusal to plead further judgment was rendered for the defendant, dismissing the action.

The appellant contends—1. That the "Act for the relief of
20 Thomas B. Valentine" was a grant upon conditions which have been strictly performed, whereby the title vested, citing Rutherford *v.* Greene's Heirs, 2 Wheaton, 198, and other cases involving the construction of congressional donations of public lands.

For the purposes of this decision the proposition may be accepted without discussion.

2. That on the 23rd day of September, 1889, the tract in question was public land of the United States (Washington then being a Territory), and that Congress could at all times up to that date dispose of it as it saw fit, citing—

Insurance Co. *v.* Canter, 1 Peters, 542.
Goodtitle *v.* Kibbe, 9 Howard, 471.
Case *vs.* Toftus, 39 Fed. Rep., 733.

This point also may be admitted for the sake of the argument.

3. That said tract, not having been reserved by competent authority or not occupied in good faith by intending claimants under the United States land laws, was subject to selection by Valentine or his assigns in satisfaction of his grant.

Upon this proposition the issue in the case is made, and upon its determination the appeal will succeed or fail.

The act of April 5th, 1872 (17 S. A. L., 649), commonly
21 known as the Valentine scrip act, authorized Thomas B. Valentine or his legal representatives, in lieu of lands claimed by him in the Rancho Arroyo de San Antonio, in the county of Sonoma, California, to select and have patents for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and if unsur-

veyed when taken to conform when surveyed to the general system of United States land surveys.

The complaint, as above quoted, contains allegations which negative any claim that this tract was occupied or appropriated in pursuance of any statute or treaty of the United States, or was mineral in character, or had been reserved, or was subject to an Indian title. These allegations and the *pro forma* admissions under the 1st and 2nd points strip the case of every defense, except that the tract in question was not "public lands" within the meaning of the act of 1872.

In our view it was not such land, and for the following reasons:

1. The complaint shows that it is a portion of the tide flats, is covered and uncovered by the flow and ebb of the tide, being uncovered at ordinary low tide and covered at ordinary high tide, and by reference to the public surveys we find that it is a portion of the bottom of Elliott bay, an arm of the sea, in front of the city
22 of Seattle.

2. Within the meaning of the acts of Congress and the policy thereby clearly established from the earliest times, the decisions of courts, and the general understanding, this is not "land" but "water," to which none of the public or special and private land laws, including the Valentine scrip act, have any application. It may be conceded that Congress, by clear and explicit enactment, could have granted the bottom of navigable waters to any person it saw fit before the admission of the State, but it will not be contended that the language of the Valentine scrip act is to receive any construction other than that awarded to the hundreds of other acts which relate to the "public lands" subject to Mr. Valentine's selection, or that the lands therein meant are any lands different from those subject to entry under the pre-emption, homestead, and other laws; therefore it is but proper that, in construing this act, reference should be had in this manner to the hitherto universally sustained rule that "public land" means upland and not soil beneath navigable waters.

The Supreme Court of the United States, in the case of Hardin *v.* Jordan, decided May 11th, 1891 (11 Sup. Court Rep., 808), uses the following pointed language:

"It has been the practice of the Government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream or other body of water. The meander lines run along or near the margin of such
23 waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the Federal and State courts, that such meander lines are not intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered, and that the waters themselves constitute the real boundary. Railroad Co. *v.* Schurmeier, 7 Wall., 272, and other cases. * * * It has never been held that the lands under water in front

of such grants are reserved by the United States, or that they can be afterwards granted out to other persons to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain and to derogate from the value of natural boundaries, like streams and bodies of water. With regard to grants of the Government for lands bordering on tide-water it has been distinctly settled that they only extend to high-water mark and that the title to the shore and lands under water in front of lands so granted inures to the State within which they are situated, if a State has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State, a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishing, and cannot be retained or granted out to individuals by the United States."

In view of such authoritative language in every event it would require the most explicit and unmistakable words in an act of Congress to cause a court to construe any grant upon tide-water to extend beyond high-water mark, even though its date were within territorial times and there were no argument to be made upon the theory of a trust imposed upon the General Government for the benefit of the future State. Whatever the theory may be the fact is that the Government never intended to have any grant under its public or private land laws construed to include the soil beneath the waters, and all of its grants are fully and justly satisfied
24 by making them apply to the land and not to the water.

3. We are urged to consider that this tract is not covered by water navigable, in fact, because it is uncovered at low tide, though it is conceded that the ordinary high tide does cover it, and that the ordinary high-water mark is between it and the upland. But the rule is a fixed one that high-water mark is the limit of Government grants; therefore it can make no difference whether at low tide the area exposed is great or little or whether the fluctuation of the waters is as great as in the bay of Fundy or as slight as at St. Augustine. The high tide is the boundary beyond which there is no land to be granted.

4. Another suggestion is that at various points, some of them within this State, the patents of the Government do purport to cover tracts below high-water mark, showing the action of the Land Department in that particular. It may be that there are such patents. The convenience of surveyors may have led them to show meander lines on their plats which do not exactly accord with the sinuosities of the shore, but they are probably errors coming within the maxim *de minimis non curat lex*. If they are more the answer is that the practice of the land officers in a few cases does not make the law. Such cases are mere mistakes on the part of the Government's agents.

5. It is contended that in San Francisco Savings Union *v.*
25 Irwin, 28 Fed. Rep., 709; 11 Sawyer, 667, it was held that the title of the State of California to submerged tide-flats capable of reclamation by embankments was not based upon her sovereignty, but solely upon the act of 1850 (9 S. A. L., 519), granting swamp and overflowed lands within their borders to the States.

But although the brief asserts that the land in the case of Savings Union *vs.* Irwin and that in the case at bar were identical in character we do not so understand the fact to be. In the former case the controversy was over the possession of "overflowed" lands lying in front of Mare island, which were sometimes called "tule" or "marsh" lands. They were lands over which the high monthly tides flowed, but not the ordinary daily tides, and between the island and portions of them there were navigable sloughs. They were more or less covered with vegetation, and were in no sense the bottom of the sea or river. Moreover the real controversy there was whether a Mexican grant, followed by a United States patent, for "Mare island, bounded by the water's edge," authorized a subsequent grantee to convey the island, "including all the tule or low and marsh land belonging to the same or which has ever been reputed or claimed to belong to the same," which the court settled in the negative, citing United States *v.* Pacheco, 2 Wall., 589.

It is currently reported that there are thousands of acres of
26 lands in this State of the general character of the lands in the Mare Island case, much of which has been patented by the United States and is now under a high state of cultivation. But they are not such lands as the daily tides of Elliott bay cover. They are tide, marsh, or prairie lands composed of alluvial soil, where the interference of the extreme tides or high water caused by wind currents does not prevent a natural growth of vegetation.

6. Lastly, the constitution of this State is appealed to, to show that there is no objection from that source to the appellant's claim. Sec. 2, art. 17, of the constitution declares that "the State of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States, provided the same is not impeached for fraud." There was no occasion for mentioning swamp and overflowed lands, since they were expressly withheld from the State by the enabling act, sec. 17. Whether the section amounts to a recognition or confirmation of such patents or not, as claimed by appellant, need not be determined. The language is, "disclaims all title." The State merely asserts nothing. But appellant claims that his attempted location of scrip a few days before the constitution went into effect entitles him to share in the disclaimer, since he may get a patent which will relate to the date
of his location. This position in some cases might require
27 a decision of what is meant by "patented" in the section quoted, but it is not necessary here. We have seen from the highest judicial authority that the United States never would, if it could, patent this tract or recognize appellant's claim to it unless through the mistake of its officers, and no such impossible case was contemplated by the constitution.

The judgment of the superior court is affirmed.

T. L. STILES, *J.*

We concur.

T. J. ANDERS, *C. J.*
ELMON SCOTT, *J.*
R. O. DUNBAR, *J.*
JOHN P. HOYT, *J.*

28 In the Supreme Court of the State of Washington.

AUGUST 1, 1891.

MILTON L. BAER, Appellant.
vs.
MORAN BROS. COMPANY, a Corporation, Respondent. } No. 188. Judgment.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of King county and upon the argument of counsel, and the court having fully considered the matter and being fully informed in the premises and having filed its opinion in writing, it is now, on this 1st day of August, A. D. 1891, on motion of J. C. Haines, Esquire, of counsel for appellee, considered, adjudged, and decreed that the judgment of the said superior court be, and the same is hereby, affirmed with costs, and that the said Moran Brothers Company, a corporation, have and recover of and from the said Milton L. Baer the costs of this action, taxed and allowed at $48.10 *dollars*, and that execution issue therefor.

And it is further ordered that this cause be remitted to the said superior court for further proceeding, in accordance with the opinion herein filed.

Entered Journal, Record 1, page 416.

29 In the Supreme Court of the United States.

MILTON L. BAER, Plaintiff in Error,
vs.
MORAN BROTHERS COMPANY, a Corporation, Defendant in Error.

To the Hon. Thomas J. Anders, chief justice of the supreme court of the State of Washington:

Comes now Milton L. Baer, plaintiff in error above named, by Beriah Brown, Jr., his attorney, and respectfully represents unto your honor:

1. That in a cause wherein your petitioner was appellant and Moran Brothers Company, a corporation, was appellee, which cause was heard and finally determined in the supreme court of the State of Washington on the 1st day of August, 1891, a final judgment was therein on that day made and entered against your petitioner, appellant therein, and in favor of Moran Brothers Company, a corporation, appellee therein, which judgment was in the words and figures following, to wit:

"MILTON L. BAER, Appellant,
vs.
MORAN BROTHERS COMPANY, a Corporation, Respondent. } No. 188. Judgment.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of King county and upon the argument of counsel, and the court being fully informed

in the premises and having filed its opinion in writing, it is
30 now, on this 1st day of August, A. D. 1891, on motion of J. C. Haines, Esq., of counsel for appellee, considered, adjudged, and decreed that the judgment of said superior court be, and the same is hereby, affirmed with costs, and that the said Moran Brothers Company, a corporation, have and recover of and from the said Milton L. Baer the costs of this action, taxed and allowed at — dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the said superior court for further proceedings, in accordance with the opinion herein filed."

2. That the supreme court of the State of Washington, in which said judgment was made and entered, was the highest court of said State in which a decision in said suit could be had.

3. That in said suit your petitioner was plaintiff and appellant and said Moran Brothers Company, a corporation, was defendant and appellee.

4. That your petitioner is entitled to a writ of error to remove said cause to the Supreme Court of the United States for the following reasons: That said suit was originally brought by your petitioner in the superior court of King county to recover the possession of a certain tract of land in King county, State of Washington; that your petitioner in said suit claimed title to said tract of land by virtue of a selection thereof made by him in the United
31 States land office at Seattle, Washington, as assignee of Thomas B. Valentine, under and by virtue of an act of the Congress of the United States entitled "An act for the relief of Thomas B. Valentine," approved April 5th, 1872, and the judgment of the said superior court was that your petitioner had no title to the said tract for the reason that said tract was not of the character of land which said Valentine or his assigns could select under the provisions of said act; that from said judgment of said superior court your petitioner took his appeal to the supreme court of the State of Washington, and that said judgment was affirmed by the said supreme court, as hereinbefore set out; that said judgment of said superior court and the affirming judgment of said supreme court were erroneous and to the prejudice and damage of your petitioner.

5. That said judgment of said supreme court of the State of Washington was final.

Wherefore your petitioner prays that he may be allowed a writ of error to remove said cause to the Supreme Court of the United States.

MILTON L. BAER, *Petitioner.*

BERIAH BROWN, JR.,
Attorney for Petitioner.

(Endorsed:) No. 188. Milton L. Baer, plaintiff in error, *vs.* Moran Brothers Company, a corporation, defendant in error. Petition for writ of error. Filed Sept. 30, 1891. C. S. Reinhart, clerk.

32 In the Supreme Court of the State of Washington.

MILTON L. BAER, Plaintiff in Error,
vs.
MORAN BROTHERS COMPANY, a Corporation, Defendant in Error. } Order.

Now, on this 30th day of September, 1891, before me, Thomas J. Anders, chief justice of the State of Washington, came Milton L. Baer, above named, by Beriah Brown, Jr., his attorney, and presents his petition praying that he may be allowed a writ of error to remove to the Supreme Court of the United States for review a certain case wherein a final judgment has been entered in the supreme court of the State of Washington, which case in said court was entitled "Milton L. Baer, appellant, *vs.* Moran Brothers Company, a corporation, defendant;" and it satisfactorily appearing to me that said petitioner is by law entitled to said writ, I do now here order that said petition be granted and that said writ be allowed as prayed, and I further order that the bond herein be fixed at the sum of two hundred and fifty dollars.

T. J. ANDERS,
Chief Justice Supreme Court of Washington.

(Indorsed:) No. 188. Milton L. Baer, plaintiff in error, *vs.* Moran Brothers Company, a corporation, defendant in error. Order. Filed Sept. 30, 1891. C. S. Reinhart, clerk.

Entered Record I, page 426.

33 Know all men by these presents that we, Milton L. Baer, as principal, and Frank Burns, Jr. (unmarried), and James T. Blakistone (unmarried), as sureties, are held and firmly bound unto Moran Brothers Company, a corporation, in the full and just sum of two hundred and fifty dollars, to be paid to the said Moran Brothers Company, a corporation, its successors, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 1st day of October, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a regular term of the supreme court of the State of Washington, in a suit depending in said court between the above-bounden Milton L. Baer, as plaintiff and appellant, and the said Moran Brothers Company, a corporation, as defendant and appellee, a judgment was rendered against the said Milton L. Baer, and the said Milton L. Baer having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Moran Brothers Company, a corporation, and to J. C. Haines, its attorney, citing and admonishing it to be and appear at a

34 Supreme Court of the United States to be holden at Washington within sixty days from the date thereof:

Now, the condition of the above obligation is such that if the said Milton L. Baer shall prosecute the writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

MILTON L. BAER. [SEAL.]
JAMES T. BLAKISTONE. [SEAL.]
FRANK BURNS, JR. [SEAL.]

Sealed and delivered in presence of—
S. R. FRAZIER.
N. B. COLT.

STATE OF WASHINGTON, } ss:
King County. }

Frank Burns, Jr., and James T. Blakistone, being first duly sworn, each for himself doth depose and say that he is a resident of the State of Washington; that he is not a counsellor or attorney at law, sheriff, clerk of the court, or other officer of any court; that he is worth the full amount of two hundred and fifty dollars over and above all just debts and liabilities and exclusive of property exempt from execution.

FRANK BURNS, JR.
JAMES T. BLAKISTONE.

Subscribed and sworn to before me this 1st day of October, 1891.

[Notarial Seal of N. B. Colt.]

N. B. COLT,
Notary Public in and for the State of Washington, Residing at Seattle.

The within bond and sureties thereon approved, at Olympia, Washington, this 3rd day of October, A. D. 1891.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

(Endorsed:) No. 188. Bond. Filed Oct. 3, 1891. C. S. Reinhart, clerk.

35 UNITED STATES OF AMERICA, ss:

Seal United States Circuit Court, District of Washington, Northern Division.

The President of the United States of America to the honorable the judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Washington, before you or some of you, being the highest court of law or equity of the said State in which a decision could

be had in the said suit between Milton L. Baer, as plaintiff and appellant, against Moran Brothers Company, a corporation, as defendant and appelle-, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemp-
36 tion specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Milton L. Baer, plaintiff and appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty (60) days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the first day of October, in the year of our Lord one thousand eight hundred and ninety-one.

A. REEVES AYRES,
Clerk of the United States Circuit Court
for the District of Washington,
By R. M. HOPKINS, *Deputy.*

Allowed by—
T. J. ANDERS,
Chief Justice of the Supreme Court
of the State of Washington.

36½ [Endorsed:] No. 188. Writ of error. Filed Oct. 3, 1891. C. S. Reinhart, clerk. —— ——, dept.

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Moran Brothers Company, a corporation, and to J. C. Haines, Esqr., its attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within sixty days from the date hereof, pursuant to a writ of error

filed in the clerk's office of the supreme court of the State of Washington, wherein Milton L. Baer is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this third day of October, in the year of our Lord one thousand eight hundred and ninety-one.

T. J. ANDERS,
Chief Justice of the Supreme Court of Washington.

37½ [Endorsed:] No. 188. Citation. Filed Nov. 21, 1891. C. S. Reinhart, clerk.

On this 10th day of October, in the year of our Lord one thousand eight hundred and ninety-one, personally appeared Beriah Brown, Jr., before me, the subscriber, John S. Jury, a notary public in and for King county, State of Washington, and makes oath that he delivered a true copy of the within citation to John C. Haines, Esq., the attorney of record of said Moran Brothers Company, a corporation, defendant in error.

BERIAH BROWN, JR.

Sworn to and subscribed the 10th day of October, A. D. 1891.

(Seal John S. Jurey, Notary Public, State of Washington.)
(Commission Expires June 5, 1894.)

JOHN S. JUREY,
Notary Public, Residing at Seattle, Wash.

38 Supreme Court of the United States.

MILTON L. BAER, Plaintiff in Error,
vs.
MORAN BROTHERS COMPANY, a Corporation, Defendant in Error. } Return.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, do hereby certify that I have compared the annexed papers with their respective originals on file and remaining on record in my office, and that the same are true copies thereof and of the whole of such originals, and in obedience to and in conformity with the writ of error in the above-entitled suit I do hereby return to the Supreme Court of the United States a true copy of the record and of the proceedings in said cause and of the opinion of the supreme court of the State of Washington, together with the original writ of error and original citation issued in said cause, under my hand and the seal of said supreme court of the State of Washington.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court this twenty-first day of November, 1891.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court, State of Washington.

Endorsed on cover: Case No. 14,945. Washington supreme court. Term No., 683. Milton L. Baer, plaintiff in error, *vs.* Moran Brothers Company (a corporation). Filed December 11, 1891.

683

Supreme Court of the United States.

OCTOBER TERM, 1891.

MILTON L. BAER, Plaintiff in Error,

vs.

MORAN BROTHERS COMPANY, a Corporation, Defendant in Error.

No. 1471

Comes now Milton L. Baer, plaintiff in error in the above-entitled cause, by John H. Mitchell, his attorney, and moves the court for an order to advance said cause on the docket for hearing at an early date.

This motion is based upon the following facts, which appear in the records and files of the cause in this court, or are admitted to be true by all parties to the record:

1. The plaintiff in error brought his action to recover the possession of a certain tract of land situated in King County, State of Washington, in the Superior Court of the State of Washington.

2. The sections of the code of the State of Washington, under which this action is brought require the plaintiff on such an action to set out the nature of his title, whether legal or equitable.

3. In pursuance of this permission, plaintiff in error, in his complaint, set out his claim of title, which was based on an act of Congress entitled "An act for the relief of Thomas B. Valentine," approved April 5th, 1872, and the proceedings had thereunder by the courts and the departments, whereby said Valentine or his legal

representatives became "entitled to select and shall be allowed patents for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, etc." That scrip had been issued to said Valentine in pursuance of said act of Congress and the proceedings had thereunder, and that a certain piece of said scrip had been duly assigned to plaintiff in error, who thus became the legal representative of said Valentine. That on the 23d day of September, 1889, and before the State of Washington was admitted into the Union, the plaintiff, as legal representative of Valentine, selected the tract of land in controversy, filed his notification with the register and receiver of the land office at Seattle, Washington, deposited with said register his scrip for cancellation, and tendered to the register and receiver their fees. That the said tract of land was unoccupied and unappropriated public lands of the United States; was nonmineral in character, but was a portion of a tract of tide flats or mud flats, covered and uncovered by the flow and ebb of the tide. To this complaint the defendant in error interposed his demurrer, which the court below sustained, holding that lands over which the tide flowed were not, in a Territory, public lands of the United States within the meaning of the grant to Valentine. On appeal, the Supreme Court of the State of Washington sustained the judgment of the lower court, and plaintiff in error sued out his writ of error and had this cause removed to this court for review. These are the record facts.

The facts, outside the record, which render this case a matter of great public interest, are as follows:

1. That adjoining the two principal cities of the State of Washington—Seattle and Tacoma—are tracts of land similar to the land in controversy, aggregating in area upwards of 5,000 acres, of great present and greater

prospective value. That it is essential to the growth and business of these cities that they, or at least a considerable portion of them should be held in private ownership. That, already, from the necessities of business, manufacturing enterprises of various kinds have been erected thereon. That some 2,000 acres of these lands were selected by holders of Valentine scrip, besides plaintiff, before the State was organized. That, on admission, the State of Washington asserted in her Constitution that the title to these lands was vested in her by virtue of her sovereignty. That the State is taking steps towards having these lands listed and sold without regard to the claims of plaintiff in error and other claimants under acts of Congress. That until a judicial determination is had by this court of this case, the titles to all of these tracts of land will remain clouded, necessary improvements and reclamation suspended, and the natural growth and development of these two large cities retarded. That a serious injury will result to all of the citizens of the State of Washington thereby. That an early hearing in this case will prevent an interminable amount of prospective litigation between claimants to these lands under the United States and claimants under the State, should the State proceed to sell them as is now contemplated. The authorities of the State of Washington are as solicitous as are the counsel here of an early determination of this matter.

I herewith present a letter from Hon. W. C. Jones, Attorney General of the State of Washington, in support of this statement:

ATTORNEY GENERAL'S OFFICE.

SPOKANE FALLS, WASHINGTON, *January 19, 1892.*

M. L. BAER, Esq., *Seattle, Washington.*

DEAR SIR: Your letter addressed to the Tacoma Hotel, was handed me just as I left that city for Spokane. I also find a communication from you under date of Jan-

uary 14th on my desk. I believe the steps which I have already taken in the Yesler case will have quite as much weight with the court in urging the advancement of your case as if I had made the same representation in the case of Baer *v.* Moran Bros.

I have joined with Mr. Shephard in an application asking the advancement of that case on the docket, setting forth all the reasons which could be urged in favor of advancing your case, and that application has been forwarded to the Supreme Court some time ago.

Very truly yours,

W. C. JONES.

The public questions involved in this case and the reasons why in the public interests this case should be brought to a speedy hearing are substantially similar to those involved in the case of Yesler *v.* Board of Harbor Line Com's. *et al.*, No. 1364, advanced at the present term and set for trial on the second Monday of next term. This cause ought to be argued at the same time.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

The defendant in error unites in this motion to advance the cause above mentioned.

E. C. HUGHES,
Attorney for Defendant in Error.

683

Office Supreme Court U. S.
FILED.
APR 18 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 992.

MILTON A. BAER, Plaintiff in Error.

vs.

MORAN BROTHERS COMPANY, A Corporation, Defendant in Error.

Error to the Supreme Court of the State of Washington.

MOTION TO ADVANCE.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

McGILL & WALLACE, Printers, 1107 E St. N. W., Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1892.

MILTON L. BAER, Plaintiff in Error,
vs.
MORAN BROTHERS COMPANY, A CORPORATION, Defendant in Error.
No. 992.

Comes now Milton L. Baer, plaintiff in error in the above-entitled cause, by John H. Mitchell, his attorney, and moves the court for an order to advance said cause on the docket for hearing at an early date.

This motion is based upon the following facts, which appear in the records and files of the cause in this court, or are admitted to be true by all parties to the record:

1. The plaintiff in error brought his action to recover the possession of a certain tract of land situated in King County, State of Washington, in the Superior Court of the State of Washington.

2. The sections of the code of the State of Washington under which this action is brought require the plaintiff on such an action to set out the nature of his title, whether legal or equitable.

3. In pursuance of this permission, plaintiff in error in his complaint set out his claim of title which was based on an act of Congress entitled "An act for the relief of Thomas B. Valentine," approved April 5, 1872, and the proceedings had thereunder by the courts and the departments, whereby said Valentine or his legal

representatives became "entitled to select and shall be allowed patents for an equal quantity of the unoccupied and unappropriated public lands of the United States not mineral, etc." That scrip had been issued to said Valentine in pursuance of said act of Congress and the proceedings had thereunder, and that a certain piece of said scrip had been duly assigned to plaintiff in error, who thus became the legal representative of said Valentine. That on the 23d day of September, 1889, and before the State of Washington was admitted into the Union, the plaintiff, as legal representative of Valentine, selected the tract of land in controversy, filed his notification with the register and receiver of the land office at Seattle, Washington, deposited with said register his scrip for cancellation, and tendered to the register and receiver their fees. That the said tract of land was unoccupied and unappropriated public lands of the United States, was non-mineral in character, but was a portion of a tract of tide flats or mud flats, covered and uncovered by the flow and ebb of the tide. To this complaint the defendant in error interposed his demurrer, which the court below sustained, holding that lands over which the tide flowed were not, in a Territory, public lands of the United States within the meaning of the grant to Valentine. On appeal, the Supreme Court of the State of Washington sustained the judgment of the lower court, and plaintiff in error sued out his writ of error and had this cause removed to this court for review. These are the record facts.

The facts, outside the record which renders this case a matter of great public interest, are as follows:

1. That adjoining the two principal cities of the State of Washington—Seattle and Tacoma—are tracts of land similar to the land in controversy, aggregating in area upwards of 5,000 acres, of great present and greater prospective value. That it is essential to the growth and

business of these cities that they, or at least a considerable portion of them, should be held in private ownership. That, already, from the necessities of business, manufacturing enterprises of various kinds have been erected thereon. That some 2,000 acres of these lands were selected by holders of Valentine Scrip, besides plaintiff, before the State was organized. That, on admission, the State of Washington asserted in her constitution that the title to these lands was vested in her by virtue of her sovereignty. That the State is taking steps towards having these lands listed and sold without regard to the claims of plaintiff in error and other claimants under acts of Congress. That until a judicial determination is had by this court of this case, the titles to all of these tracts of land will remain clouded, necessary improvements and reclamation suspended, and the natural growth and development of these two large cities retarded. That a serious injury will result to all of the citizens of the State of Washington thereby. That an early hearing of this case will prevent an interminable amount of prospective litigation between claimants to these lands under the United States and claimants under the State, should the State proceed to sell them as is now contemplated. The authorities of the State of Washington are as solicitous as are the counsel here of an early determination of this matter, as is fully made to appear by the following motion of Hon. W. C. Jones, Attorney-General of the State of Washington, embodying a statement of facts by him, and also by Hon. James H. McGraw, the present executive of the State of Washington, and which motion is submitted as a part of and in connection with the application of the plaintiff in error as a part hereof by said Attorney-General Jones.

SUPREME COURT OF THE UNITED STATES.

October Term, 1892.

MILTON L. BAER, Plaintiff in Error,
vs.
MORAN BROTHERS COMPANY, a Corporation, Defendant in Error.
} No. 992.

Comes now the State of Washington, by W. C. Jones, Attorney-General, who appears pursuant to instructions from the chief executive of this State, and moves the court for an order to advance said cause on the docket for a hearing at an early date, and also for leave to appear and participate in the argument of said cause.

This motion is based on the following facts:

First. The plaintiff herein claims title to a portion of the shores of the tide waters of the State of Washington by virtue of the location of Valentine Scrip thereon.

Second. The State of Washington claims to be the absolute owner of all the shores and beds of navigable waters within said State, and denies the right of any person to appropriate any portion of the same without the consent of the State.

Third. The State of Washington has enacted legislation looking to the disposition of so much of the shores of the tide waters of the State as may be disposed of without impairing the public rights of navigation therein; and the areas claimed by the plaintiff in this action lie within harbor lines heretofore laid out by the officers of said State in front of the city of Seattle, and may be so disposed of.

Fourth. The pendency of this action in this court and the claim of the plaintiff made therein operate as an impediment to the proper and just execution of the laws of the State with reference to the shores of tide waters.

The reasons for the necessity of an early determination of this litigation are further set forth in the following letter from his Excellency, the Governor of the State of Washington:

"Hon. W. C. JONES, *Attorney-General.*

"SIR: My attention is called to the fact that there is now pending in the Supreme Court of the United States two cases involving the title to the shores and beds of the navigable waters of this State, viz., the case of Milton L. Baer *v.* Moran Bros. Co., a corporation, and the case of Mann *v.* The Tacoma Land and Improvement Co.

"As the entire area in dispute in these two cases is claimed by the State of Washington to be its absolute property, and the appellants in these two cases claim title to the property as against the State by virtue of the location of Valentine scrip thereon, I deem it important that these cases be disposed of at as early a date as practicable, so that the apparent cloud cast upon the State's title by these proceedings may be removed. This matter is the more important for the reason that it is likely that this property will be offered for sale by the State, pursuant to its laws relating to tide lands, and the pendency of these actions may by clouding the title prevent their sale for a fair and just sum.

"Yours truly,

"J. H. MCGRAW, *Governor.*"

Respectfully submitted.

W. C. JONES,
Attorney-General of the State of Washington.

Wherefore it is prayed an order may be made by this honorable court advancing said cause on the docket for hearing at an early date after commencement of next term, and that the State of Washington have leave to appear and participate in the argument thereof.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

W. C. JONES,
Attorney-General of the State of Washington.

Office Supreme Court U. S.
FILED.
APR 19 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1893

MILTON L. BAER, Plaintiff in Error

vs.

MORAN BROTHERS COMPANY, a Corporation Defendant in Error

ON WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

BERIAH BROWN, JR.,
M. L. BAER,
Of Counsel.

SOUND PRINTING COMPANY, SIXTH AND LENORA STREETS, SEATTLE, WASHINGTON

IN THE

SUPREME COURT

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MILTON L. BAER,
Plaintiff in Error,

vs.

THE MORAN BROTHERS COMPANY, A CORPORATION,
Defendant in Error.

ON WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT OF THE CASE.

On the 27th day of May, 1890, the plaintiff filed a complaint in the Superior Court of King County, Washington, against the defendant in a suit brought to recover the possession of the tract of land described in the record.

The action was a statutory one, brought under the provisions of Section 536 of the Code of Washington of 1881, which section is as follows, to wit:

"SEC. 536. Any person having a valid, subsisting interest in real property and a right to the possession thereof, may recover the same by action in the District Court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein."

Section 538 of the Code of Washington, of 1881, is as follows: "The plaintiff in such action shall set forth in his complaint the nature of his estate, claim or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims, and the superior title, whether legal or equitable, shall prevail. The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had."

In pursuance of the requirements of this latter section of the Code of Washington the plaintiff in his

complaint set out with minute particularity the nature of his claim to the property, which was a selection by him in the local United States land office, as assignee of Thomas B. Valentine, in pursuance of an Act of Congress entitled "An Act for the Relief of Thomas B. Valentine," approved April 5, 1872, of a tract of public land of the United States including within its limits the particular tract for which recovery was sought.

The complaint set out in full the Act of Congress referred to, the proceedings had thereunder, the issuance of scrip to Thomas B. Valentine, the assignment of the scrip to plaintiff in error, his selection of the tract of public land in the local United States land office, and the payment of fees and deposit of the scrip by him, *all of which proceedings were had while Washington was still a Territory* and before its admission into the Union as a State.

After these recitals the complaint stated: "That the said tract of land so selected by said plaintiff was at the time of its selection by said plaintiff unoccupied and unappropriated public land of the United States, not mineral; in this, that the said tract of land was situated in the Territory of Washington, was *a portion of the tide flats, was covered and uncovered by the flow and ebb of the tide,* uncovered at ordinary low tide and was covered with water at ordinary high tide; and had never

been set apart by the United States for any particular use, that the said tract or any portion thereof was not in the possession of any person claiming or intending to claim any title thereto under or in pursuance of any statute or treaty of the United States; and the said tracts were not chiefly or at all valuable for mineral, and the Indian right of occupancy thereto had been extinguished."

To this complaint the defendant interposed his demurrer, which was sustained, the Superior Court of King County holding that a tract of "tide flats" covered by ordinary high tide and uncovered by ordinary low tide was not "public land of the United States" within the meaning of the Act of April 5, 1872.

An appeal was had to the Supreme Court of the State of Washington, which affirmed the decision of the lower Court, and for the same reasons. The sufficiency of the complaint in other respects was not questioned. The case comes here on writ of error to the Supreme Court of the State of Washington. The sole error assigned is the holding by the said Supreme Court that a tract of land in a Territory of the United States, "a portion of the *tide flats*, covered and uncovered by the flow and ebb of ordinary high and low tides," is not "public land of the United States" within the meaning of the Act of

April 5, 1872; and the consequent sustaining of the demurrer to the complaint.

This is the solitary question which the record presents for determination by this Court.

THE GRANT TO VALENTINE.

The Act of April 5, 1872, is as follows, after the title and enacting clause:

"That the Ninth Circuit Court of the United States for the District of California be and hereby is authorized and required to hear and decide upon its merits, the claim of Thomas B. Valentine, claiming title under a Mexican grant to Juan Miranda, to a place called the Rancho Arroyo de San Antonio, situate in the County of Sonoma and State of California, in the same manner and with the same jurisdiction as if the claim to the said tract of land had been duly presented to the Board of Land Commissioners under the provisions of the Act entitled "An Act to ascertain and settle the private land claims in the State of California, approved March third, eighteen hundred and fifty-one, and an appeal had been duly taken from the decision to the District Court of California by the said Thomas B. Valentine.

"SEC. 2. That in said hearing any testimony heretofore taken before said board of commissioners

in relation to said claim, on behalf of said claimant, or of the United States, may be read subject to all just exceptions to its competency and additional testimony on either part may be taken, under the order and direction of said Circuit Court, as to the validity and extent of said claim.

"SEC. 3. That an appeal shall be taken from the final decision and decree of said Circuit Court to the Supreme Court of the United States by either party, in accordance with the provisions of the tenth section of said Act of March third, eighteen hundred and fifty-one, within six months after the rendition of such final decision; and a decree under the provisions of this Act, in favor of said claim, shall not affect any adverse right or title to the lands described in said decree, but in lieu thereof the claimant or his legal representatives may select and shall be entitled to patents for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the legal subdivisions provided for in the United States land laws, and if unsurveyed when taken to conform, when surveyed, to the general system of United States land surveys; and the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, shall be authorized to issue scrip in legal subdivisions to the said Valentine or his legal

representatives in accordance with the provisions of this Act.

"*Provided:* That no decree in favor of said Valentine shall be executed, nor be of any force and effect against any person or persons; nor shall land scrip or patents issue, as hereinbefore provided, unless the said Valentine shall first execute and deliver to the Commissioner of the General Land Office a deed conveying to the United States all his right, title and interest to the land covered by the Miranda grant."

This Act of Congress was:

1st. A law of Congress, to be construed precisely on the same principles as are applied in the construction of any other legislative act, and consequently having "such force as the intent of the legislature requires."

Schulenberg vs. Harriman, 21 Wallace, 62.

2d. The proceedings had under the Act of April 5, 1872, and the decision of the United States Circuit Court, subsequently affirmed by this Court, definitely determined that Thomas B. Valentine was the owner of the Miranda grant, and under the treaty of the United States with Mexico, was entitled to have had that grant confirmed. His deed to the United States of the land included within that grant, and his acceptance of the provisions of

the Act of April 5, 1872, and the issuance to and acceptance by him of scrip in pursuance of said Act, constituted, in connection with the Act itself, a contract for value, whereby the government had received, accepted and retained full consideration for the lands granted to Valentine. As a portion of such a contract, the Act of 1872 does not come within the rule that statutory grants are to be strictly construed in favor of the public, but was entitled to be liberally construed. This was the rule of the common law as shown in

Bacon's Abridgement, Prerogative, F. 2, pp. 602 to 604.

Comyn's Digest, Grant, G., 12.

Chitty on Prerogatives of the Crown, Chap. 16, S. 3.

We are aware that this Court has in many cases laid down the general principal that *all* public grants are subject to the rule of strict construction, in favor of the public, but an examination of these cases shows that in every instance where such language was used, the grant being construed was in its nature a bounty, and not an express contract for value as in the case at bar.

In this latter particular class of case there is nothing in the decisions of this Court to change the rule of the common law as expounded by Mr. Jus-

tice Story: "That the contracts of the king for value are liberally expounded that the dignity and justice of the government may never be jeoparded by petty evasions or technical subtleties."

While thus claiming a right to have the Act of 1872 liberally construed, it is not with any intent to claim that anything passed to Valentine by implication, or beyond the literal and exact wording of the Act, but to forestall a strained and extravagant construction which would impose limitations on his grant, beyond those contained in the Act itself.

3d. The Act of 1872 was a grant of public lands to Thomas B. Valentine or his legal representatives, the quantity to be determined by the subsequent decision of the courts, and the selection to be made by himself. With the issuance of the scrip to Valentine, the grant wanted only selection by him to make it perfect.

Rutherford vs. Greene's Heirs, 2 Wheaton, 198.

Wallace vs. Parker, 6 Peters, 680.

Lessieur vs. Price, 12 Howard, 59.

Fremont vs. United States, 17 Howard, 525.

Schulenberg vs. Harriman, 21 Wallace, 62.

With the selection by plaintiff in error of the tract of land described in the pleadings, his deposit

of the scrip in the local land office, the identity of that particular tract of granted land was made perfect. The location of the land with the scrip "passed the fee out of the United States and vested it in plaintiff as grantee."

Larriviere vs. Madegan, 1 Dillon, 457.

This with the proviso that the tract of land so selected was public land of the United States, and was not included in any of the designated classes of public lands which were expressly excluded in the grant to Valentine.

The tract selected by plaintiff in error was situated in the Territory of Washington, did not come within any of the exceptions to the Act of 1872, was unoccupied, unappropriated and non-mineral in character. Was it public land of the United States?

The theories with which plaintiff in error has been confronted throughout the conduct of this case are baldly these: That the proprietary interest in lands over which the tide ebbs and flows, which lands are situated in a Territory, is not subject to disposition by the United States, but that the power of alienation is hampered by a trust in favor of the future State; and that on admission into the Union every new State, by virtue of sovereignty, and without express grant from Congress, takes a *proprietary* interest in all lands flowed by the tide.

Neither of these propositions is supported by any direct adjudication by this Court, although the decision in Pollard vs. Hagan (3 Howard, p. 230), and abundance of dicta in other cases, have been interpreted by some courts as leading to these conclusions.

On the first proposition, as to the *jus disponendi* of all classes of tide lands being in the United States in a Territory, our position is this: That all the lands in the Territory of Washington, whether high or low, wet or dry, not held in private ownership, belonged, prior to the admission of the State into the Union, to the United States, and that the proprietary interest in such lands was subject to full, free and unlimited alienation by the United States.

This proposition seems too clear to be refuted, and is supported by abundance of authority, from which we cite as follows:

"All the lands in the territories not appropriated by competent authority before they were acquired are in the first instance the exclusive property of the United States, to be disposed of to such persons and at such times and by such titles as the government may deem advantageous."

Irwin vs. Marshall, 20 How., 558.

"The term territory as here used is merely descriptive of one kind of property, and is equivalent

to the word 'land.' And Congress has the same power over it as over any other property belonging to the United States, and this power is vested in Congress without limitation."

United States vs. Gratiot, 14 Peters, 526.

"With respect to the public domain the constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the time, the conditions, the mode of transferring this property or any part of it, and to designate the persons to whom the transfer shall be made."

Gibson vs. Choteau, 13 Wallace, 92.

"The lands in the Territory of Oregon, *including the beds and shores of navigable waters below ordinary high tide or water, belonged*, prior to the admission of the State into the Union, to the United States as proprietor, and was subject to its jurisdiction as sovereign. Upon admission of the State into the Union such beds or shores *not otherwise disposed of by the United States* became the property of the State in its sovereign capacity, and subject to its jurisdiction and disposal."

Shively vs. Welch, 20 Federal Reporter, 28–32.

"In the territories the national government is both the sovereign and proprietor. Congress has the power to govern them, and in so doing exercises the combined power of the national and state governments (Insurance Co. vs. Canter, 1 Peters, 542), and as such sovereign and proprietor it may dispose absolutely of all the public land in the Territory, whether *high or low, wet or dry.* For the time being, as sovereign, it has the *jus publicum* or right of jurisdiction and control of the shores for the benefit of the public, as in the case of a public highway over private land; while as proprietor it has the *jus privatum* or right of private property, subject to the *jus publicum* (Gould on Waters, Sec. 17). This *jus publicum,* whether held by the national government during the territorial period or the State thereafter, may be sold or disposed of by either who represent the public."

Case vs. Loftus, 39 Federal Rep., 733.

"Undoubtedly Congress might have granted this land" (i. e., tide lands on Mobile bay, Ala.) "to the patentee, or confirmed his Spanish grant before Alabama became a State, but this was not done."

Goodtitle vs. Kibbe, 9 Howard, 471.

See, also—

National Bank vs. Yankton, 101 U. S., 33.
San Francisco Savings Union vs. Irwin, 28 Federal, 708.
Teschemacher vs. Thompson, 18 Cal., 11.

This, however, is simply multiplying authorities in support of the elementary proposition that the right to acquire property carries with it necessarily the right of disposition. How far this right of disposition may extend depends purely upon the title by which the property was acquired. If acquired by the terms of any trust deed there can be no disposition which can defeat the objects of the trust. Herein lies one of the broad distinctions between the case at bar and the case of Pollard vs. Hagan (*supra*). A proper examination of the case of Pollard vs. Hagan will show that the decision therein turned not on any *implied trust*, but on an express trust created by the very deeds of cession by which the United States acquired title to the lands in Alabama, and that this trust extended to all the public lands so acquired, high lands as well as tide lands. We quote:

"We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction or right of soil in and to the territory of which Alabama or any of

the new states was formed, except for temporary purposes and to *execute the trust created* by the acts of the Virginia and Georgia legislatures and the deeds of cession executed by them to the United States, and the *trust created* by the treaty with the French republic of the 30th of April, 1803, ceding Louisiana."

Again from the same decision:

"The object of all the parties to these contracts of cession was to convert the land into money for the payment of the debt, and to erect new states over the territory thus created; and as soon as these purposes could be accomplished the power of the United States over these lands, as property, was to cease. Whenever the United States shall have fully executed these trusts the municipal sovereignty of the new states will be complete throughout their borders, and they and the original states will be upon an equal footing in all respects whatever. We therefore think the United States held the public lands within the new states by force of the deeds of cession; etc."

It will be noted that neither in the case of Pollard vs. Hagan or in *any others* of the Alabama cases was it denied that the United States had the right to sell or grant tide lands prior to the admission of the state into the Union. On the contrary

in the later case of Goodtitle vs. Kibbe, 9 Howard, p. 471, this Court with the same justices on the bench, modified Pollard vs. Hagan, while reaffirming the decision, by this language: "Undoubtedly congress might have granted this land to the patentee or confirmed his Spanish grant before Alabama became a state. But this was not done."

The decisions in the Alabama cases amount simply to this: That the United States took title to all lands in Alabama by virtue of trust deeds. That by the terms of the trust, Alabama, on admission into the Union as a state, became by virtue of sovereignty, owner of the shores and lands under the navigable waters not previously granted by the United States, and that after the then existing national debt was extinguished Alabama by virtue of sovereignty, would also take title to all unsold public upland. The last proposition has not of late years been seriously contended for by Alabama.

The different status of public lands in Washington is apparent. In that state the title of the United States is not based upon any deed or act of cession or treaty with any foreign nation. Its sole claim of title to the soil of the state of Washington is based upon its original discovery and occupancy by citizens of the United States. In the various contentions with other powers this has always been

tha claim of the executive department of our government.

> Greenhow's Memoirs of the Northwest Coast of North America, Senate Executive Document 174, 26th Congress, 1st Session, p. 185.

This claim of the political department of the government is binding on the Courts.

> Foster & Elam vs. Nelson, 2 Peters, 253.

We think the proposition is sound beyond legitimate contention; that thus acquired the United States took the fee in all lands within the territory of Washington, and thereafter held them subject only to its own laws then or thereafter to be enacted, and that these laws alone constitute the criterion by which their status at the time of the selection made by plaintiff shall be determined; and that the United States could validly sell or dispose of tide lands bordering the coast of a territory, subject to the municipal control, or police jurisdiction, or the *jus publicum*.

The notion that any trust exists which would prevent the alienation by the United States of its *proprietary* interest in such lands, partakes more of a fanciful theory than a sound legal contention.

This is the view taken without reservation or qualificatson in the last edition of Black's Pomeroy

on Water Rights, by the eminent editor of that standard text-book.

> Black's Pomeroy on Water Rights, edition of 1893, Sec. 237.

In but one single adjudicated case, aside from the case at bar, has the right of disposition by the United States of tide lands in a Territory been called in question. This right of disposition during the territorial period in Washington was exercised for years, and when susceptible of reclamation tide lands were freely disposed of under the general land laws. In that state to-day thousands of acres of such lands, identical in character with the tract in controversy, are held under United States patents. The greater part of Townships 32 N., R. 3 E., W. M.; 33 N., R. 3 E., W. M.; 34 N., R. 2 E., W. M., and 34 N., Rs. 3 and 4 E., W. M., are tide lands which have been entered and patented under the homestead and pre-emption laws. In the field notes of the surveys of these townships (pp. 195–197, Vol. 22, Field Notes of Washington Territory, Seattle District) these lands are described as—

"Land, tide prairie, subject to overflow at high water two to four feet."

Under the townsite Act of March 3, 1863 (12 U. S. Stat. at Large, p. 754), the President was authorized to reserve from the *public lands*, whether sur-

veyed or unsurveyed, townships on the *shores* of harbors, etc. In pursuance of this Act the President did reserve the townsite of Port Angeles, in Washington Territory, *to the line of low water,* and caused the same to be surveyed, and there were more than 100 lots platted, sold and patented there below the high-water mark.

Many of the original donation claims in Washington Territory were extended far below the line of ordinary high tide, notably the Maynard donation claim, the exterior lines of which take in more than 30 acres of the very body of tide flats from which the claim of plaintiff in error was selected. A considerable portion of this donation claim is still covered by the diurnal flow of the tide.

That such grants of tide lands were made by the United States during the territorial period is expressly recognized in the constitution of the State of Washington. Section 2, Article XVII, provides: "The State of Washington disclaims all title in and claim to all tide, swamp and overflowed lands patented by the United States; provided the same is not impeached for fraud."

See Scurry vs. Jones, 30 Pacific, 716.
Battersby vs. Tide Land Commissioners, 32 Pacific, 97.

We think it must be conceded that during the territorial period the *jus disponendi* of tide lands

was in the United States, was freely exercised, and that in all dealings of the executive department of the government therewith no distinction was made between them and any other "public lands of the United States."

While we contend, and we think the authorities support our contention, that the United States had a perfect right to dispose of the *proprietary* interest in tide lands in a territory, we admit that the ownership of such tide lands, as far, at least, as they were covered by waters navigable in fact, was hampered by a trust in favor, not of the future state, but of the public in general, and that the state, on admission into the Union, succeeded as sovereign, in a degree, at least, to the trust theretofore exercised by the United States.

But this trust was not the express "trust" created by deed, as referred to in Pollard vs. Hagan, but rather the trust founded on the analogies of the common law, which would prevent public right of use of the navigable waters as a highway of commerce from being impaired by the action of either sovereign power.

In lands flowed by the tide the title is divisible into two distinct portions, the *jus privatum* or right of private property, which, when owned by the

king, was at common law the subject of full and unlimited transfer.

Phear on Rights of Water, p. 41.

Hall's Rights of the Crown and Privileges of the Subject in the Seashore of the Realm, 2d ed., p. 14.

The other was the *jus publicum* or right of public use for purposes of navigation and fisheries; which from its nature was a trust vested in the king, and which since the adoption of Magna Charta has not been the subject of disposition by the crown. The former is a mere property right in the king, as the ultimate source of title to all real property in the kingdom. The latter is an essential of sovereignty, which cannot be parted with without impairing the sovereignty. It is to the latter title, and to that alone, which a state (in the absence of an express grant from Congress) accedes by virtue of its sovereignty. So acquired it cannot be parted with, but must be retained to protect the public rights of navigation from being impaired. If it is essential to the complete sovereignty of the State that the right should be acquired, it is manifestly equally essential that it should be retained, and not made the subject of grant or barter.

This is not a novel doctrine. Its foundation is found in recent decisions of this Court. In construing a grant made by the Legislature of New

Jersey in Hoboken vs. Pennsylvania Railroad Company, 124 U. S., p. 681, this Court said:

"The defendants' act of incorporation would probably relieve the defendants, after the work was executed, from the consequences of an unlawful encroachment on public lands in front of the streets, and if a nuisance in the obstruction of navigation, but it cannot affect the public easement of access to navigable waters which existed before the Act was passed. That public right is entirely distinct in its essential qualities from the title of the state to lands under tide waters. The former *inheres in the state in its public capacity;* the latter is *strictly proprietary.*"

The point is more fully made by this Court in Illinois Cent. R. Co. vs. State of Illinois, 146 U. S., 387, as follows:

"General language sometimes found in opinions of the Courts expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases."

And, again:

"The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as

to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

This latter case particularly is a perfect elucidation of the principle for which we are contending, that the title of a state to soil covered by navigable waters, based on sovereignty, is a political and not a property right, and cannot be parted with by the state.

That the title of the state to land under navigable tide waters is to the *jus publicum* and not to the *jus privatum*, is clearly shown in an early California case, where it was held that where a tract of tide lands had been reclaimed by a mere trespasser so that it was no longer flowed by navigable waters, there was no title in the state, for no easement remained in which the public required to be protected, and that the remedy lay in prosecuting for a purpresture to compel a restoration of the land to its former condition.

Guy vs. Hermance, 5 Cal., 73–74.

There are other cases in which states, setting up a claim to what, at common law, were part of

the *jura regalia* of the crown, have failed to show a distinction between those rights which were political in character and those which are essentially proprietary. In California, on admission into the Union, it was for a long time contended that the state, by virtue of its sovereignty, acquired title to all the gold and silver mines within its limits. This view was upheld by the Supreme Court of the state (Hicks vs. Bell, 3 Cal., 219), Pollard vs. Hagan being the principal authority relied upon to support this contention. This decision became a rule of property in the state, and it was not until 1863 that the distinguished Chief Justice, now a Justice of this Court, drew the clear distinction between the regalian rights which are incident and those which are necessary to sovereignty. We quote from the decision (Moore vs. Smaw *et al.*, 17 Cal., 218, *et seq.*):

"It is undoubtedly true that the United States "held certain rights of sovereignty over the terri- "tory which is now embraced within the limits of "California, only in trust for the future state, and "that such rights at once vested in the new state "upon her admission into the Union. But the own- "ership of the precious metals found in the public or "private lands was not one of these rights. Such "ownership stands in no different relation to the "sovereignty of a state than that of any other "property which is the subject of barter and sale.

"Sovereignty is a term used to express the supreme "political authority of a state or nation. Whatever "rights are essential to the existence of this author- "ity are rights of sovereignty. Thus the power to "declare war, to make treaties of peace, to levy "taxes, to take private property for public uses— "called the right of eminent domain—are all rights "of sovereignty, for they are rights essential to the "existence of supreme political authority. In this "country this authority is vested in the people, and "is exercised through the joint action of the fed- "eral and state governments. To the federal gov- "ernment is delegated the exercise of certain rights "and powers of sovereignty, and, with respect to "sovereignty, rights and powers are synonomous "terms, and the exercise of all other rights of sov- "ereignty, except as expressly prohibited, is reserved "to the people of the respective states or vested by "them in their local governments. When we say, "therefore, that a state of the Union is sovereign, "we only mean that she possesses supreme political "authority, except as to those matters over which "such authority is delegated to the federal govern- "ment or prohibited to the states; in other words, "that she possesses all the rights and powers essen- "tial to the existence of an independent political "organization, except as they are withdrawn by the "provisions of the constitution of the United

"States. To the existence of this political author-
"ity of the state—this qualified sovereignty or any
"part of it—the ownership of the minerals of gold
"and silver found within her limits is in no way
"essential. Its minerals do not differ from the
"great mass of property the ownership of which
"may be in the United States or in individuals with-
"out affecting in any respect the political jurisdic-
"tion of the state. They may be acquired by the
"state, as other property may be, but when thus
"acquired she will hold them in the same manner
"that individual proprietors hold their property,
"and by the same right; by the right of *ownership*,
"and not by the right of *sovereignty*.

"In Hicks vs. Bell the Court states correctly
"that according to the common law of England,
"mines of gold and silver were the exclusive prop-
"erty of the crown, and did not pass in a grant of
"the king under the general designation of lands
"or mines; but it assumes that this right of the
"crown—this regalian right—vested in the state.
"'It is hardly necessary,' in the language of the
"opinion, 'at this point in our history to make an
"argument to prove that the several states of the
"union, in virtue of their respective sovereignties,
"are entitled to the jura regalia which pertained to
"the king at common law.' It is in this assumption
"that the error of the decision consists. Under the

"general designation of jura regalia are compre-
"hended not only those rights which pertain to the
"political character and authority of the king, but
"also those rights which are incidental to his regal
"dignity, and may be severed at his pleasure from
"the crown and vested in his subjects. It is only
"to certain rights of the first class that the states,
"by virtue of their respective sovereignties, are
"entitled. It is to the second class that the right
"to mines of gold and silver belong."

The parallel is apt and exact. The proprietary interest of the king in lands flowed by the tide is merely "incidental to his regal dignity, and may be severed at his pleasure from the crown and vested in his subjects."

The claim made on behalf of the state to a proprietary interest in tide lands thus finds no basis in the analogies of the common law, in logical reasoning or in well-considered decisions.

But it is difficult and indeed impossible to imagine by what process of reasoning it could be made to appear that the sovereignty of the State of Washington could be impaired by the proprietary interest in lands of this class remaining in the United States or its grantees after the admission of the state into the Union, any more than by their passing into private ownership within a year or so thereafter. In the very constitution in which the

state asserts its ownership in tide lands it makes provision for the sale of all except those outside of the harbor lines.

The state, through its attorney-general, in the case at bar, in its petition for leave to intervene herein, and its motion to advance this case for argument, admits:

"Third. The State of Washington has enacted legislation looking to the disposition of so much of the shores of the tide waters of the state as may be disposed of *without impairing the public rights of navigation therein;* and the areas claimed by the plaintiff *lie within the harbor lines heretofore laid out* by the officers of said state in front of said city of Seattle and *may be so disposed of.*"

The questions involved here are not in a broad sense constitutional; they are simply pecuniary; the paramount one being whether persons who have already purchased from the United States shall be permitted to assert their title to these lands or whether the state shall grant them to some other person. It may be urged that it has become a rule of property that new states acquire a proprietary interest in tide lands by virtue of sovereignty and that courts will not disturb settled rules. It may be observed here that if there is any such settled rule of property it does not find its basis in any direct adjudications of this Court, save and except

in the Alabama cases, which, as we have shown, differ widely from the case at bar.

In all other decisions of this Court where languge has been used which might be construed as supporting that theory, the issues presented were between parties both claiming rights under the state and relying on the state's title. In but one case has the state's capacity to make title been in issue, and in that case (Illinois Central Railroad vs. Illinois, *supra*,) the grant of the state was held void for want of power to convey.

Further than this, in all the new states bordering on tide waters, except Washington, Congress has in express terms granted to them the right to all swamp and overflowed lands within their borders. This is in itself sufficient to convey to those states all lands flowed by the tides which are capable of reclamation without interference with the public rights of navigation. Where title can thus be based on direct grant from Congress, wherein is the necessity of an attempt to bolster it up by an illogical and unsound theory based on an obsolete political heresy?

Mr. Justice Field of this Court, while sitting in the United States Circuit Court for the district of California, held this in express terms in the case of San Francisco Savings Union vs. Irwin, 28 Federal Reporter, 709. The contention was between the

grantees of the state of California and the tenants of the United States, over a tract of land flowed by the tides, adjoining Mare Island, which had been purchased by the United States from the claimant under a Mexican grant. The Court held that the grant, being bounded in terms by the water's edge, the title of the United States extended only to the ordinary high water mark, and that all land lying beyond ordinary high water mark belonged to the state by virtue of the Act of 1850, granting swamp and overflowed lands. We quote:

"That testimony clearly showed that the land was subject to periodical overflows by the rising of the tide in the bay of San Pablo, so as to make it unfit to raise the ordinary crops of the country without protecting it by levees from such overflow. The Act of 1850 grants swamp *and* overflowed lands. Swamp lands, as distinguished from overflowed lands, may be considered such as require drainage to fit them for cultivation. Overflowed lands are those which are subject to such periodical or frequent overflows as to require levees and embankments to keep out the water and render them suitable for cultivation. It does not make any difference whether the overflow be by fresh water, as by the rising of rivers and lakes, *or by the flow of the tides.*"

This decision has since been affirmed by this Court.

San Francisco Savings Union vs. Irwin, 136 U. S., p. 578.

In the State of Washington there has been no such rule of property established, practically none of this class of lands having as yet been sold by the state, although the United States has, during the territorial period, granted and patented thousands of acres to private individuals. It is only to the status of these lands in the State of Washington that the decision herein must of necessity apply.

A further question is as to whether lands of the class described in the case at bar are burdened with any easement, in a public right of navigation of the waters which flow them at high tide. The particular tract to which plaintiff asserts title, while flowed to a small depth by ordinary high tide, is neither a portion of the shore of a navigable water, nor is it flowed by waters *navigable in fact.* It is a portion of a tract of some 3,000 acres in extent, adjacent to, *but not in front of,* the city of Seattle. This tract of land is what is generally classed either as tide-flats, mud-flats or tide prairie. Strictly speaking, it is delta, composed of alluvial debris, brought down from a river emptying into the bay. These tracts are rapidly becoming dere-

lict by the accumulation of this debris and are separated from the high land on either side by the various channels of the river. A very large portion of these tracts is no longer flowed daily, but only by the extreme monthly tides. They can by no possibility be used for purposes of navigation, but are barriers against it. The status of the particular tract in controversy, with respect to the possibility of public use for purposes of navigation, is clearly shown, first, by the record, which shows that it is covered with buildings, now in possession of the corporation defendant in error, and second by the admission of the State of Washington, through its attorney-general, in its petition for leave to intervene herein, wherein it is set out that the tract lies wholly within the established harbor lines, and that the state purposes to sell it, should the state's claim of title be upheld.

Should the plaintiff in error's claim of title to the proprietary interest be upheld, it is thus apparent that that claim will not be embarrassed by any easement on behalf of the public.

However that may be, the claim of the plaintiff in error is only to the proprietary interest in these lands. Should an actual public easement exist, the proprietary interest which he claims would still have to make way for the paramount trust in behalf of the public. This much we are prepared to admit.

But "navigability in fact and not the ebb and flow of the tide" has in this country long been accepted as the test of navigability in law, and the common law test has been abrogated.

Illinois Central Railroad vs. State of Illinois, 146 U. S., 387.

The Genessee Chief vs. Fitzhugh, 12 Howard, 411.

United States vs. The Montello, 11 Wallace, 144.

Miller vs. Mayor, etc., 109 U. S., 385.

Barney vs. Keokuk, 94 U. S., 324.

Angell on Tide Waters, p. 77.

If the doctrine of the common law be so completely discarded for one purpose, it must be for all, and we submit that under the settled law of this country navigability in fact is the *sole* test of navigability in law.

Applying this test to the case at bar, it appears by the record and the admissions that the tract in controversy is entirely bare at low water, that it lies within the harbor lines established by competent state authority to protect the *navigable waters* from encroachment, and that it is covered by buildings and used for manufacturing purposes.

It is apparent that it is not covered by any waters "navigable in fact," and that thus no public easement extends over it.

To land covered by waters navigable in fact, the state undoubtedly takes a title by virtue of sovereignty, as trustee to preserve the public rights over a public highway.

In the shore proper of navigable waters, there may be an easement in the owner of adjacent high land, which will permit him the right of free access to the highway of navigable water.

But there is nothing in reason or in principle on which to base a theory that mud-flats, separated from the high land by river channels, capable of reclamation and cultivation, valuable only for that purpose or for business purposes, casually flowed by the tides but not by navigable waters, of necessity held in private ownership whenever sufficiently valuable to warrant their reclamation, should be held to differ in any respect as to title, from any other of the public lands of the United States, either before or after the state in which they lie has been admitted into the Union.

We think we have made it apparent that the *jus disponendi* of this tract was in the United States during the territorial period; that under the grant to Valentine he was entitled to select any public lands of the United States, with certain specifically enumerated exceptions; and that this tract did not come within any of those exceptions.

As the absolute property of the United States during the territorial period, and the proper subject

of grant if made in meet and express terms, it was "public land of the United States," in the ordinary, general and literal meaning of the term.

The terms "public lands" have in several decisions of this court been given a restricted meanin the construction of grants made by Congress, to exclude from such grants tracts which had been severed from the mass of the public domain, either by military or Indian reservations or inchoate Mexican and other grants, which were in litigation, and lands where the Indian right of occupancy had not been extinguished; in cases where these classes of public lands had not in express terms been excluded from the grants, the construction of which was sought. All of these classes of "reserved" or "occupied" lands were in express terms excepted from the grant to Valentine.

These exceptions and others having been specifically made in the grant to Valentine, we contend that under the settled rule of construction, every other class of lands of which the United States had an unhampered right of disposition could have been selected by Valentine, in satisfaction of his grant under the general term "public lands of the Uuited States." *Expressio unius est exclusio alterius.*

Broome's Legal Maxims, 2d Am. Ed., p. 505.

Endlich on Interpretations of Statutes, 1st Ed., p. 397, and cases cited.

We do not claim that anything passed to Valentine by implication, but only contend against a construction which would warp the language of the grant to Valentine from its plain, ordinary and literal meaning, for the purpose of imposing, by construction, another limitation beyond those imposed in the Act itself.

We think the Court below erred in holding as it did, that the tract of land selected by plaintiff in error, was not "public land of the United States," at the time of its selection, and in sustaining the demurrer to the complaint on that ground, and that this cause should be remanded for trial on the merits of the case.

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Of Counsel.

Office Supreme Court, U. S.
FILED.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

MILTON L. BAER,
Plaintiff in Error,

vs.

THE MORAN BROTHERS COMPANY,
A Corporation.

No. 683.

In Error to the Supreme Court of the State of Washington.

SUPPLEMENTAL BRIEF.

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STATEMENT OF CASE.

The statement of this case is fully set out in former brief heretofore filed in this case on the part of the plaintiff in error, which brief it is proper to state was prepared prior to the announcement by this court of its decision in the case of Shivley *v.* Bowlby at the present term. The purpose of this brief is to endeavor to show that the decision in that case is not decisive of the questions involved in the pending case.

Assignment of Errors.

1st. The court erred in holding the complaint insufficient, and in sustaining the demurrer of the defendant thereto.

2d. The court erred in holding that a tract of land in a Territory of the United States, "a portion of the *tide flats* covered and uncovered by the flow and ebb of ordinary high and low tides," is not "public land of the United States" within the meaning of the act of April 5, 1872, known as the Valentine Scrip Act. (17 U. S. Stat., 649.)

It is not our purpose to antagonize the deliberate conclusions of this court as set out in the opinions in the two recent cases of The City of Chicago *v.* The Illinois Central Railroad Company *et al.*, decided last term, and Shively *v.* Bowlby, decided at the present term, but to endeavor to show that the decisions in those cases are inapplicable to and not controlling in the case involving lands of the character involved in this action, namely, a portion of a tract of overflowed lands, bare at low tide, on the outskirts of a bay on Puget Sound, including over 3,000 acres, and extending for about two and one-half miles in length to three miles in width, as shown by the maps of the official surveys of the United States Coast and Geodetic Survey, copy of which is hereto attached.

This court will take judicial knowledge of the tide flats, otherwise designated as "mud flats," lying on and adjacent to the bays and inlets of the waters of Puget Sound.

Peyroux *v.* Howard, 7 Pet., 324;
Apollon, 9 Wheat., 374.

In the case of 7th Pet. (*supra*), this court took judicial notice of the fact that the tide ebbs and flows at New Orleans. The court, announcing its opinion in this case, said:

"It can not certainly be laid down as a universal or even as a general proposition that the court can judicially notice matters of fact; yet it can not be doubted that there are many facts, particularly with respect to *geograph-*

ical positions of such public notoriety, and the knowledge of which is to be derived from other sources than parol proof, which the court may judicially notice, as in the case of The United States *v.* Lavengeance (3 Dall., 297), the court judicially noticed the geographical position of Sandy Hook. And it may certainly take judicial notice of like notorious facts as that the bay of New Orleans, for instance, is within the ebb and flow of the tide."

A river which is one of the principal objects in the geography of a country may be judicially noticed.

United States *v.* Lawton, 5 How., 15.

In 9th Wheat. (*supra*), this court said:

"This court is bound to take notice of public facts and *geographical positions.*"

In order that it may be made plain to the court that the land in controversy is not what is ordinarily termed "shore" or "tide lands" bordering on a navigable water, either of an arm of the sea or a river, especial attention is attracted to the averments contained in the Record. These, in so far as description of land is concerned, are as follows:

"The following-described premises, situated in King County, Washington" (State of Washington), "to wit: Beginning at a point 688 feet south, and 660 feet west of the east one-fourth post of sec. 6, Twp. 24 N., R. 4 E., W. M.; thence west 150 feet; thence south 210 feet; thence east 150 feet; thence north 210 feet to place of beginning; being the premises covered by Moran Brothers Company's foundry and machine shops." (Record, 1.)

And again:

"On the 23d day of September, 1889" (this was while Washington was a Territory), "this plaintiff * * * selected the following-described tract of unsurveyed land, to wit: Beginning at a point 160 rods south of the north-east corner of section 6, Twp. 24 N., R. 4 E., W. M.;

thence west 80 rods; thence south 80 rods; thence east 80 rods; thence north 80 rods to the place of beginning; containing 40 acres, which said tract of land, when surveyed, will conform to the general system of United States land surveys, and will be known and designated as the southeast quarter of the northeast quarter of section 6, Twp. 24 N., R. 4 E., W. M." (Record, 6, 7.)

The land first heretofore described is, as appears from the Record, a *part* of the land included in the last description.

And further:

"That the said tract of land so selected by plaintiff was, *at the time of its selection* by plaintiff, unoccupied and unappropriated public land of the United States, not mineral, in this, that the said tract of land was situated in the Territory of Washington, was a portion of the tide flats, covered and uncovered by the ebb and flow of the tide, was uncovered at ordinary low tide, and was covered with water at ordinary high tide, and had never been set apart by the United States for any particular use; that the said tract or any portion thereof was not in the possession of any person claiming or intending to claim any title thereto under or in pursuance of any statute or treaty of the United States, and the said tracts were not chiefly or at all valuable for mineral, and that the Indian title of occupancy thereto had been extinguished." (Record, 7.)

It is respectfully submitted there is nothing whatever in this Record from beginning to end to show that the land involved in this action, or any part of it, is what is commonly designated in the laws as "shore" or "tide land" bordering a navigable water, but on the contrary, this Record fairly construed—even in the absence of any consideration of the public surveys of the United States—shows this land to be just what it is in fact, a part of an immense area of "overflowed lands," "*mud flats*," or "*tide flats*" overflowed by high tides and bare at low tides. From the location, in King County, State of Washington, overflowed presumably by the innavi-

gable waters of some bay or inlet of the waters of Puget Sound. The magnitude of the area included and its shape, being 40 acres and in a solid square, precludes the supposition that it is ordinary "shore" or "tide-water lands." Furthermore, the description in the complaint, it must be borne in mind, is not "*the shore,*" or part of "the shore"—not "tide *lands,*" but "a portion of the tide *flats;*" clearly indicating that the land in question is a part of one of the many vast areas located at different points adjacent to the bays and inlets of Puget Sound, and designated on the geodetic surveys of the United States as "*mud flats.*" In other words, the description contained in the complaint, instead of meaning ordinary shore or tide lands, is equivalent to an averment of "*overflowed* lands."

The terms "*shore*" or "tide *lands*" are synonymous. They include in their definition the shore lands lying on a navigable river or arm of the sea, covered and uncovered by the tides, and in which there is a *jus publicum;* while "*swamp*" or "*overflowed lands,*" whether made swamp or overflowed by tide or other waters (San Francisco Savings Union *v.* Irwin, 136 U. S., 578), are entirely different. The averment in the complaint that these are "tide *flats*" is equivalent to an averment that they are what are technically known in the law as "*overflowed lands,*" as contradistinguished from "shore" or "tide lands." The averments in the complaint, taken altogether, are equivalent in description to the term "overflowed lands" as used in the swamp land acts.

This court, in the case of San Francisco Savings Union, 136 U. S., 578 (opinion by Mr. Justice Field), defined the term "overflowed lands" as used in the swamp land act as follows:

"The testimony clearly showed that the land was subject to periodical overflows *by the rising of the tide* in the bay of San Pablo, so as to make it unfit to raise the ordinary crops of the country without protecting it by levees

from such overflow. The act of 1850 grants swamp *and* overflowed lands; swamp lands as distinguished from overflowed lands may be such as require drainage to fit them for cultivation. *Overflowed lands are those which are subject to such periodical or frequent overflows as to require levees or embankments to keep out the water and render them suitable for cultivation. It does not make any difference whether the overflow be by fresh water, as by the rising of rivers or lakes, or by the* FLOW OF TIDES. *When drainage, reclamation, or leveeing is necessary to enable the farmer to use them for some of the ordinary purposes of husbandry, the lands are within the terms of the act of Congress and the title passed by it to the State.*"

This court, in the case of Shively *v.* Bowlby, decided at the present term, unqualifiedly concedes the power of the Congress of the United States to dispose of what is known as tide lands on the shores of navigable waters in any territory of the United States, when necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the territory.

It is respectfully submitted the grant under which plaintiff claims in this case is clearly one which the Congress of the United States (and it is the sole judge, and its decision is not reviewable by the courts) deemed necessary "in order" to use the language of Mr. Justice Gray in the opinion, *supra*, "to perform international obligations," or, more properly speaking, an international obligation.

By the treaty of Guadalupe Hidalgo between this country and Mexico, the United States obligated themselves to recognize all valid grants of land within the limits of the territory ceded, before that time, made by the governments of Mexico and Spain.

Botiller v. *Dominguez*, 130 U. S., 238.

Juan Miranda was the holder of a Mexican grant called the Rancho Aroyo de San Antonio, located in the county of Sonoma and State of California, about 13,000 acres, part of which were tide flats and overflowed lands, in all respects similar to the lands in controversy.

It is submitted the act of April 5th, 1872, under which the Valentine scrip was issued, was clearly the performance, upon the part of the Congress of an "international obligation." It was a recognition, upon the part of the United States, of the validity of the Miranda grant, and of the rights of Miranda, the grantee thereunder.

Instead, however, of giving Miranda or his grantee, Valentine, the 13,000 acres included in the Mexican grant, part of which were tide flats and overflowed land, an exchange was made, and what was deemed and determined to be, by a judicial court, whose decision was affirmed by this court, an equivalent in value of the public lands of the United States, was granted. This, therefore, was not only a grant of public lands in any and all of the Territories of the United States within the power of Congress to grant, but it was clearly the *intention* of the Congress to include within its provisions every character of public lands, whether upland, tide lands, tide flats, overflowed or swamp land, not otherwise occupied or appropriated and not mineral, included in the Miranda grant. The grant being, moreover, not a gift or donation, but an exchange of lands, or a grant, in other words, for a full and adequate consideration.

In this view, therefore, we confidently insist that the doctrine enunciated by this court in Shively *v.* Bowlby clearly supports the contention of the plaintiff in error.

This court, in Shively *v.* Bowlby, suggests that it has not been the policy of the Government to grant lands between high and low water mark to individuals piecemeal, though it is admitted that it has made and confirmed such grants when necessary to carry into effect the obligations which it has assumed by *treaty*.

If any "*policy*" has been pursued by the Executive Department of the Government on the question of tide lands in the Territory of Washington, that policy, thus it appears, *was to permit their survey and entry under general land laws* whenever of sufficient extent and value to warrant the belief that they could be reclaimed from the sea and cultivated, and whenever so situated that their reclamation would not injure the public right of use of waters navigable in fact.

The only manner from which it can be determined what the *policy* of a government has been in relation to any subject is to look for either *legislative declarations of that policy* or *executive acts* from which it could be concluded.

It is notorious that there have been thousands of acres of lands lying below the line of *ordinary* high tide, and so returned on the Government surveys, surveyed and patented under general laws in the Territory of Washington. (See our brief in chief.)

The reason why such lands have been so surveyed and patented is owing to the peculiar condition of things here in the vast extent of such lands, and the further fact that the upland is covered with an enormous growth of very heavy timber, making the work of fitting it for cultivation expensive and slow. In such circumstances, the settlers soon found that it was far cheaper to reclaim tide lands from the sea, even by the erection of extremely high and strong dikes, than to attempt to remove the existing timber on the high land, not to mention that the reclaimed tide lands formed of *alluvial deposits* were infinitely richer than the high land. The *earliest and choicest selections* of farming land under the *general land laws*, in western Washington, were made of land lying wholly below ordinary high-water mark, and to-day it is possible to pass, in an ordinary high water, on a steamer past farms protected by dikes, where the *whole*

cultivated area of the farm lies many feet lower than the surface of the water.

It is respectfully submitted that Congress, in disposing of the public lands, has not, by any means, acted upon the theory that lands known as ordinary tide lands, between high and low-water mark, on navigable waters, in territories of the United States, were not disposable, and should be held as public highways, unless in case of some international duty or public exigency by the United States in trust for the future States. Upon the contrary, it is respectfully and confidently insisted that the instances in which Congress has acted upon the contrary theory, are so numerous as to constitute the rule and not the exception.

This is especially the case, in so far as the dealings of Congress and the Land Department are concerned, with the public lands, including tide, overflowed, and swamp lands of the Pacific coast. In the first place, the Land Department, on August 25, 1853, issued an order of instructions to the surveyor general of Oregon Territory, which then included the whole of Washington, directing him to extend the public surveys of the public lands on tide waters in that Territory to low-water mark. These instructions remained in force over twenty-two years, until April 14, 1875, during which time all public surveys made were so extended. During this period, moreover, the act making the grant to Valentine was passed (April 5, 1872).

The following is a copy of these instructions, taken from the record of the Land Department:

"GENERAL LAND OFFICE,
"*August 25, 1853.*

"To H. A. GOLDSBOROUGH, Esq.,
"*Olympia, Wash.*

"* * * In reply to the foregoing quotation from your letter, I have to inform you that the public land surveys will be made to *low-water* mark, as nearly as practicable. * * *

"JOHN WILSON, "*Commissioner.*"

In pursuance of surveys made under the above instructions, it is an historical fact that many thousands of acres of tide *flats* similar to those involved in the present action were included within the specific boundaries of many donation claims bordering on the shores of Puget Sound under the grant of September 27, 1850, commonly called the Donation Act; also within many homestead and pre-emption claims.

But again, Congress has expressly asserted its right to dispose of tide flats. By section 2380 Revised Statutes "the President is authorized to reserve from the *public lands*, whether surveyed or unsurveyed, on the shores of harbors, at the junction of rivers, important portages or any natural or prospective centres of population. While section 2381 Revised Statutes provides for their appraisal and sale.

And in virtue of this disposition it is a notorious and historical fact that the townsite of Port Angeles, in the then Territory, now State, of Washington, including a large area of tide flats, between high and low water mark, similar to those involved in the present action, has been reserved, appraised, and the lots sold by the Government to private purchasers and patents issued to such purchasers. It will be seen from the above that in this legislation the Congress recognizes tide lands, the shores of harbors, as being parts of the *public lands* of the United States.

But not only so, the executive department of the Government, acting under the authority of Congress, has at various times and in many instances, in creating Indian reservations by executive orders, included within their boundaries lands on navigable waters between high and low water mark in the territories. This was so in the executive order of President Grant, November 22, 1872, creating the Lummi Reserve for the use of the Dwamish and other allied tribes of Indians, the boun-

daries of which were as follows: "Commencing at the eastern mouth of Lummi River, * * * thence west along said township line *to low-water mark* on the *shore* of the Gulf of Georgia, thence southerly and easterly *along the said shore.*" (Executive Orders Establishing and Defining Existing Indian Reservations, edition Nov. 1, 1882, p. 52.)

So, also, in the executive order of President Grant of November 4, 1873, defining the boundaries in accordance with the provisions of a treaty of the Quinaielt Reserve. The last boundary line ran as follows: " * * * thence with the course of the said river to a point on the Pacific coast at *low-water mark*, a half mile above said river, thence southerly *at low-water mark*, along the Pacific to the place of beginning." (*Supra*, p. 57.)

So, also, in the executive order of September 9th, 1873, in setting apart the Swinomish Reserve in Territory of Washington. The boundary runs as follows:

"Beginning *at the low-water mark on the shore of Sim-ilk Bay*, * * * thence north on east line of said section 3 to a point where the same intersects *low-water mark on the western shore of Padilla Bay.*" (*Supra*, p. 57.)

The same is also true of executive order of December 23d, 1873 (p. 58, *supra*), defining the boundaries of the Tulalip or Snohomish Reserve, in the Territory of Washington, as follows:

"Beginning at low-water mark on the north shore of Steamboat Slough, * * * thence west * * * * *to low-water* mark on the *shore* of Port Susan; thence southeasterly *with the line of low-water mark* along said shore and the shores of Tulalip Bay and Port Gardner, with all the meanders thereof, * * * to the place of beginning."

The constitution of the State of Washington, as we have seen, recognizes the right of all claimants to these

tide flats claiming under patent from the United States in virtue of grants made while the State was a Territory. This, it will be perceived, is a direct recognition upon the part of the sovereign State of the right and power of the Congress to dispose of these lands during the territorial period, either by specific grants or by general laws. And as a patent, as frequently held by this court, is but the evidence of title in the case of a present grant, such as the act under which plaintiff claims in this case, a fair construction of the constitution of the State of Washington leads to a recognition upon the part of the State of the right of claimant in this case to the lands in question and that of all others similarly situated, whether patent had actually issued or not.

But even admitting that it has not been the customary policy of the Executive Department to permit such lands to be entered under the general land laws, what is the case at bar? The plaintiff in error is not claiming land under any *general land law*, but under a *special grant* of Congress. He is not *restricted* by the act to lands subject to entry under general land laws, but the *exceptions are expressly enumerated* in his grant.

It is to be presumed that *Congress knew the law*, and knew that it had an unrestricted right to dispose of all the tide lands in the Territory of Washington. The mind of the legislature was upon *exceptions* when the grant was made, and numerous exceptions were made as to the class of lands which Valentine *was not* to be permitted to take by virtue of his grant. But tide lands or lands below high-water mark were not enumerated among those exceptions, and *by every rule of construction of either grants, laws, or contracts*—and the act of 1872 partakes of the nature of all—all classes of lands which Congress had the power to grant, and which were not excluded in express terms, were among those of which he was authorized to make selection.

We submit, that from the foregoing exposition of the law and facts, that these lands are "public lands of the United States and subject to entry under the act of March 5, 1875."

The attorney general of the State of Washington, in his brief in introduction herein, refers to the entry of the plaintiff in error as having been made upon the "*shores* and *bed* of Elliott Bay," a navigable arm of Puget Sound.

We *insist* there is nothing in the Record on which to base this statement. As we have shown (*supra*), it by no means follows as a necessary implication that such a tract is either the "*bed*" or the "*shore*" of a navigable stream or bay, but clearly the contrary.

He states that he "can confidently assert that no Federal decision can be found in which the term 'public lands' has been construed to embrace any of the area lying below the line of ordinary high tide."

We can as *confidently assert* that no Federal decision can be found in which the term "public lands" has been construed as being limited to lands above the line of ordinary high-water mark.

With the assertion that "the uniform construction placed by the Department of the Interior upon the term 'public lands' has been in harmony with the above authority," we must take decided issue.

As shown heretofore, the Department of the Interior has in numerous instances issued patents to lands lying below the line of ordinary high tide, under *general land laws*, and the constitution of the State of Washington, cited in our brief in chief, recognizes this fact by disclaiming title to all lands so patented.

The assertion is made by the attorney general of the State of Washington that "jurists and courts have gone to the extent of holding that the beds and shores of navigable waters cannot be considered *land* in any sense of the term."

That tracts of land of the character of that in the case at bar are "land" seems to hardly require an argument. There is no other term by which it can be designated.

Such tracts are spoken of as "land" in the constitution of the State of Washington. The heading of Article XVII of the said constitution is "tide lands." The various acts of the legislature of the State providing for the *disposition* of such tracts so designate them, and if *lands* for the State, why not lands while under the control of the General Government.

Such tracts are included within the definition of "land" by the elementary law writers.

Bouvier's Law Dictionary, title "Land;"
3 Kent's Com., 12th ed., 401;
1 Sharswood's Blackstone, 1st ed., p. 18.

The cases cited by the attorney general for the State of Washington do not support his contention, with the possible exception of the citation from Angel on Tide Waters. The citation from 3 Kent, 427, is *mutilated.* The whole paragraph is as follows:

"It is a settled principle of the law that the right of soil of owners of land bounded by the sea or on navigable rivers, where the tide ebbs and flows, extends to high-water mark, and the shore below *common, but not ordinary* high-water mark belongs to the State as trustee for the public; and in *England* the *Crown, and in this country the people, have the absolute proprietary interest in the same, though it may by grant or prescription become private property.*"

(The parts in italics are those omitted from the citation made by the attorney general.)

It might be pertinent to here inquire if such tracts can pass by grant, of *what nature* would the grant be if the contention of the intervenor be correct. If not "land," certainly no *form of conveyance* known to the law could pass title.

It is admitted by the Attorney-General that if the State's title is established the State will dispose of the particular tract in controversy, under existing laws of the State of Washington, which provides for the disposition of "tide lands."

In the third subdivision of the brief filed in behalf of the State of Washington it is asserted that plaintiff's complaint admits that the tract sought to be selected by him was not unoccupied at the *date of his selection*, and that he alleges in his pleadings that the defendant in error was occupying the area with a manufacturing establishment.

This is either *a manifest error*, arising from a want of knowledge of the Record here, or it is mere *word juggling*. The plaintiff, in his complaint, distinctly avers that the "*land was unoccupied*" at the time of his selection; avers that the defendants in error entered into possession *subsequent* to the said filing, and admits that the defendants in error were occupying the tract with a manufacturing establishment at the time said suit was brought.

As to the argument that if plaintiff in error could make title to this tract under a *special law*, the defendant in error might have been entitled to do so under a *general* law, we can simply say that defendants in error, as the Record discloses, entered upon the land subsequent to plaintiff's location thereof; and further, we are not aware of any existing general land law uder which a private manufacturing corporation can make title to public lands of the United States of the character of the land in the case at bar, or of any other character, with the sole exception of mineral lands.

The defendant in error, as the Record shows, is simply a *lawless trespasser, without title or capacity to make title.*

In the fourth subdivision of the brief of intervenor it is alleged that this tract is within the incorporated limits

of the city of Seattle. This is wholly gratuitous on the part of the Attorney General, as there is nothing whatever in the Record to justify the statement, while, as a matter of fact, it is not within such city limits.

The intervenor for the State alleges as another reason why plaintiff's title should not be upheld, that possibly his entry may be found *to be outside of the harbor lines.* If this should follow it would be *the plaintiff's loss.* The paramount *jus publicum* would rest in the State wherever the proprietary interest may remain. If the plaintiff's land lies without the harbor line and is needed for the *public use as a water highway,* then he can make no use of his land that could in any way impair that public right of use.

But the attorney general is on record in this case in his brief asking leave to intervene, *admitting* that the tract covered by plaintiff's selection lies wholly *within* the harbor lines, and that the State's interest therein are *purely pecuniary,* in that it desires to sell the said tract and turn the proceeds of the sale into its treasury.

That same admission is the most effectual answer to all that portion of the attorney general's brief, which turns upon the granting of tide lands by the United States as impairing the State's sovereignty, "despoiling it of its most important power and functions" and "robbing it of the attributes of sovereignty."

In the same brief of the attorney general is a letter from the Governor of the State of Washington, addressed to the attorney general, in which he uses the following significant language:

"As the entire area in dispute in these two cases is claimed by the State of Washington to be its *absolute property,* and appellants in these two cases claim title to the property as against the State by virtue of the location of Valentine Scrip thereon, I deem it important that these cases be disposed of at as early a date as practicable, so that the apparent cloud cast upon the State's title by

these proceedings may be removed. This matter is the more important for the reason that it is likely that this property will be offered for sale by the State pursuant to its laws relating to tide lands, and the pendency of these actions may, by clouding the title, prevent their sale for a fair and just sum."

Reference is here made to copies of the official map of the Geodetic Survey, hereto attached and made part hereof, and attention is attracted to the fact that the *dotted* lines on such map represent the *littus maris*, or sea shore proper, while the extended lines represent the *overflowed* lands, or tide flats, inside of these lines. The property in controversy is included within the limits of the latter, and *not* within the limits of the former.

In conclusion we cannot refrain from adverting to the numerous misconceptions of counsel, who have been permitted to file briefs in this case as to the record herein, as evidenced by the many misstatements made.

Mr. Fay, representing G. F. Dearborn, has in his brief at the very outset fallen into the same error as did the Attorney General of Washington. On pages 1 and 2 he says: "The Record shows that prior and at the date of this application a fractional portion of the forty acres of the tide flats sought to be filed upon by plaintiff were occupied by defendants with valuable improvements, in use for business, trade, and commerce."

This, if the court please, is a bald misstatement; the Record in this case shows no such thing. On the contrary, it shows just the reverse. The complaint says: "That the said tract of land so selected by said plaintiff *was at the time* of its selection by said plaintiff *unoccupied* and *unappropriated* public land of the United States." * * * (Record 7.)

But notwithstanding this fact, counsel on the same page of his brief (2) reiterates the assumption by saying, under the head of "ARGUMENT:" "Whatever may be

their legal character, *it is admitted* by the brief of plaintiff' * * * that a portion of the area involved *was occupied, appropriated,* and in possession of defendant at the time plaintiff attempted to file his scrip over it."

No such admission is made in plaintiff's brief, but precisely the contrary is stated. (Plaintiff's brief, page 3.)

But again, Mr. Fay in his brief, continuing (page 2), says:

"And that all of the tide flats lie in front of, and in a direct line between intervenor's upland and the deep, public, navigable waters of Elliott Bay."

There is not a sentence in the Record from beginning to end to warrant any such statement.

These are only a few of the very many inaccuracies of statement as to the state of the Record in this case; we have neither the time nor patience to cite all, and will content ourselves with invoking the maxim *ab uno disce omnes.*

Respectfully submitted,

JOHN H. MITCHELL,
BERIAH BROWN, JR.,
M. L. BAER,
Counsel for Plaintiff in Error.

Supreme Court
FILED,
Mar. 5, 1894
JAMES H. McKENNEY,
CLERK.

683

IN THE SUPREME COURT

OF THE

UNITED STATES.

MILTON L. BAER, *Plaintiff in Error*,

vs.

MORAN BROTHERS COMPANY, a corporation, *Defendant in Error*, and
THE STATE OF WASHINGTON, *Intervenor*.

Error from the Supreme Court of the State of Washington.

BRIEF ON BEHALF OF INTERVENOR.

W. C. JONES,
Attorney General of the State of Washington.

O. C. WHITE, . . STATE PRINTER.

Filed this.....day of....., 189.....

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1894.

BRIEF ON BEHALF OF INTERVENOR.

It appears from the pleadings in this case that the plaintiff in error is one of the legal representatives of Thomas B. Valentine; and that by virtue of the act of April 5, 1872, entitled "An act for the relief of Thomas B. Valentine," and pursuant to the grant therein made, authorizing Valentine or his legal representatives to select portions "of *unoccupied* and *unappropriated public lands* of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and if unsurveyed when taken, *to conform when surveyed to the general land system of the United States land surveys*," plaintiff in error attempted, on the 23d day of September, 1889, to select an area alleged to contain forty acres in extent upon the shores and bed of Elliott Bay, a navigable arm of Puget Sound, constituting the harbor of the city of Seattle.

It also appears that prior to the attempted selection of the area sought to be selected, it was occupied by the defendant in error with a manufacturing establishment. He filed his complaint in the nature of ejectment, to dispossess defendant in error, setting up his attempted selection as the foundation of his cause of action.

To this complaint the defendant in error interposed a demurrer, which was sustained by the superior court of King county; from which decision plaintiff appealed to the supreme court of the State of Washington, which, by its opinion filed August 1, 1891 (2 Wash. 608), affirmed the decision of the superior court.

From that decision plaintiff prosecuted this writ of error to this court.

The intervenor herein claims to be the absolute owner and proprietor of all the shores and beds of the navigable waters within the state. This assertion is made by the state constitution, article XVII, and the force of the assertion is sought to be carried out in behalf of the state by the provisions contained in article XV of the constitution, as well as numerous laws enacted by the legislature.

> See act of March 28, 1890; page 736, Hill's Code of Washington.

In support of its claim the State of Washington insists:

First: That the federal government never possessed the authority to make a grant to Mr. Valentine of any part of the shores or beds of the navigable waters within the state.

Second: That the federal government has never made any attempt to dispose of such shores and beds. That the grant to Mr. Valentine of the right to select portions of the *unoccupied* and *unappropriated public lands* of the United States does not authorize him to select any portion of the shores or beds of its navigable waters.

And in this connection it is urged—

(*a*) That such shores and beds are not *public lands*, within the meaning of the law.

(*b*) That they were not *unoccupied* at the date of the selection.

(*c*) That they were not *unappropriated*, within the meaning of the law, at such date.

I.

The precise question whether congress has the power to make a valid grant of the shore or bed of tide waters in a territory so as to preclude the future state from the right to assert her sovereignty and proprietorship over the area thus granted, has never been presented to a court of last resort, for the reason probably that congress has never attempted to make any such grant. But numerous expressions have been used in the decisions of this court which could not be harmonized with the recognition of such a power on the part of congress. Thus in the case of *Mumford v. Wardwell*, 6 Wall. 435, the court says:

"The settled rule of law in this court is, that the shores of navigable waters and the soils under the same in the original states were not granted, by the constitution, to the United States, but were reserved to the several states; and the new states since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original states possess within their respective borders."

And in *Pollard v. Hagan*, 3 How. 230, the following language is used:

"To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers."

These cases are emphatic authorities to the effect that congress has not the power to grant the shores and beds of navigable waters within a *state*. But it is contended that prior to the admission of the state into the union the government of the United States is the sovereign and proprietor of such shores and beds, and that, therefore, while the territory remains in that condition, it is competent for the general government to make a valid grant of such area. This result can, however, only be reached by assuming that the states by the adoption of the federal constitution created a new government with functions and powers which it is manifest the original framers of that document and those who were instrumental in bringing about the federal union did not contemplate. The federal government has derived all the powers that it possesses from the states which created it, and can exercise no power or function except such as have been expressly granted or by necessary implication. It has been often held in this court that the jurisdiction and proprietorship of the shores and beds of the navigable waters is one of the necessary

and essential attributes of sovereignty. And the power on the part of the federal government to dispose of such navigable waters within a territory could only be supported on the theory that prior to the admission of that state into the union the jurisdiction of the general government over such territory was the jurisdiction and proprietorship of a sovereign. It is true that congress has the power to make all necessary laws for such territory; but that is because the states have by the constitution expressly invested the general government with that power. But there is nothing in the constitution of the United States which can by any fair interpretation be construed to vest in the general government the functions and attributes of sovereignty over such territory. And if, as is shown in the case of *Pollard v. Hagan* (*supra*), it would be dangerous to vest in the general government the power to transfer to a citizen the title to the shores and soils under the navigable waters of a state, it would be equally dangerous to give congress the power to dispose of the navigable waters of a territory. For it is one of the underlying principles of our form of government that a territory of the United States, upon attaining a sufficient population and wealth, shall be erected into a separate state and admitted into the union on an equal footing with all other states of the union. And it would be an act of manifest injustice for congress, even if it had the power to do so, to make grants which would result eventually in

bringing a community into the union as a state degraded below the rank of her sister states, despoiled of a portion of her most important powers and functions and robbed to that extent of the attributes of sovereignty which belong to all other states of the union. Indeed, in the case of *Barney v. Keokuk*, 94 U. S. 324, this court clearly intimates that that power does not exist.

In the case of *Mayor v. Eslava*, 9 Porter (Ala.), 602, the court, speaking of the absolute dominion and proprietorship of the state over all its navigable waters, says:

"The original states possessed this interest in the waters within their jurisdictional limits, and the new states cannot stand on an 'equal footing' as members of the union if the United States still retain over their navigable waters any other right than is necessary to the exercise of its constitutional powers."

In *Huse v. Glover*, 119 U. S. 546, the court uses this language in speaking of the State of Illinois:

"On her admission she at once became entitled to, and possessed of, all the rights of dominion and sovereignty which belonged to the original states."

Again, in *Webber v. Harbor Commissioners*, 18 Wall. 65, the same court says:

"Upon the admission of California into the union upon an equal footing with the original states, *absolute property in, and dominion and sovereignty over*, all soils under the tide waters within her limits passed to the state."

In *Withers v. Buckley*, 20 How. 84, the same court says:

"Clearly, congress could exact of a *new state* the surrender of no attribute inherent in her character as a sovereign, independent state, or indispensable to her equality with her sister states, necessarily implied and guaranteed *by the very nature of the federal compact.* Obviously, and it may be said primarily, among the incidents of that equality is the right to make improvements in the rivers, water courses and highways situated within the state."

Again, in *County of St. Clair v. Livingston*, 23 Wall. 68, the court says:

"By the American revolution the people of each state in their sovereign character acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the constitution to the United States, but were reserved to the states respectively; and *new states* have the same rights of sovereignty and jurisdiction over this subject as the original ones."

In *Chapin v. Bourne*, 8 Cal. 296, the supreme court of California uses the following language:

"It (the title to the soils underlying navigable waters) belonged to the United States *in trust* for any new state that might be erected out of said territory, and passed to the state of California on her admission by virtue of her sovereignty."

In *Haight v. Keokuk*, 4 Iowa, 213, the supreme court of that state says:

"It has been said that the government cannot convey the land between high and low water mark on the public

or navigable rivers. Although no state may exist at the time of such a grant, as in this case, yet grants and sales made under such circumstances are to be construed as having a view to the future sovereignty which may or will arise, and so as not to impair its rights when arisen. It is our opinion, therefore, that the complainant's rights of soil are to be limited to the line (high water mark) established in the case of *McManus v. Carmichael.*"

In *Bissell v. Henshaw*, 1 Sawyer (U. S. Ct. Ct.), 579, the court says:

"By the admission of California into the union it became, by virtue of its sovereignty, entitled to *all* the lands below ordinary high water mark, according to *Pollard's Lessees v. Hagan*, 3 How. 212, and other cases."

See, also, *McCready v. Vir.*, 94 U. S. 391.
Packer v. Bird, 137 U. S. 661.
Hardin v. Jordan, 140 U. S. 371.
Hinman v. Warren, 6 Ore. 411.
McManus v. Carmichael, 3 Iowa, 1.

The foregoing authorities make no distinction whatever between territory which was acquired by the federal government by original cession from the states, and territory which was acquired either by purchase, discovery or conquest; and the cases above cited relate to territory acquired by the United States in each of these different ways. Plaintiff in error cites no authorities in which any importance was attached to this distinction by the courts, although it seems to be the burden of his argument when

criticising the decision in *Pollard v. Hagan*, and some other cases.

In view of the foregoing authorities, it must be conceded that the power of congress to make such a grant as is contended for by the plaintiff in this case, is extremely doubtful. And congress cannot be presumed, in the absence of the clearest and most unequivocal terms, to make a grant which it did not have the undoubted power to make. Indeed, if its power in this regard were not doubtful, the same presumption would follow, in view of the well established principle of law that public grants to private citizens or corporations are strictly construed against the grantee, and pass nothing by implication. He who seeks any right derived from a public grant must point to the very words in the grant which clearly and unequivocally express the intention on the part of the legislature to extend the right, privilege or franchise to the limit claimed. Such has been the uniform doctrine of the courts, and it is well stated in the case of *Pa. R. R. Co. v. Canal Commissioners*, 21 Pa. State, 9, as follows:

"When a state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power which belongs to her, it is so easy to say so we will never believe it to be meant when it is not said. In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation. If the usefulness of the company would be increased by extending its privileges, let the legislature see to it, but let it be remembered that nothing but plain English words will do it."

And in the case of *U. S. v. Arredondo*, 6 Peters, 729, this court quotes with approval the following language:

"Public grants convey nothing by implication; they are construed strictly in favor of the king. . . . Grants of the strongest kind, *ex speciali gratia, certa scienta, et mero motu*, do not extend beyond the meaning and intent expressed in them, nor, by any strained construction, make anything pass against the apt and proper, the common and usual signification and intendment of the words of the grant, and passes nothing but what the king owned."

And in the case of *D. & P. R. R. Co. v. Litchfield*, 23 How. 66, in construing a grant of public lands to the State of Iowa to aid in the construction of a railroad, this court says:

"But if we had doubts from any obscurity of the act of congress, a settled rule of construction would determine the controversy. All grants of this description are strictly construed against the grantees; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and if not thus expressed, they cannot be implied."

And in the same case the court quotes with approval the following language of Lord Ellenborough:

"If the words would fairly admit of different meanings, it would be right to adopt that which is more favorable to the interest of the public and against that of the company, because the company, in bargaining with the public, ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged unless it is clear that it was so intended."

The language above quoted from the case of *D. & P. R. R. Co. v. Litchfield*, is repeated by this court in the case of *Leavenworth R. R. Co. v. United States*, 92 U. S. 733; and the court adds:

"And if a right be asserted against the government, it must be so clearly defined that there can be no question of the purpose of congress to confer it. In other words, what is not given expressly, or by necessary implication, is withheld."

The above cases are particularly applicable to the case at bar, because in each of them was the construction placed by this court upon grants of public lands. And the rule of strict construction was vigorously and justly applied.

See, also, *Newhall v. Sanger*, 92 U. S. 761.
Ruggles v. Ill., 118 U. S. 536.
Wright v. Nagle, 101 U. S. 791.
Meinot v. R. R. Co., 18 Wall. 206.
Minturn v. La Rue, 23 How. 435.
Turnpike Co. v. Ill., 96 U. S. 63.
N. W. Fertilizing Co. v. Hyde Park, 97 U. S. 659.
Charles River Bridge v. Warren Bridge, 11 Peters, 420.
Cooley on Constitutional Limitations (5th ed.), pages 488, 489 and 490.
Sutherland on Construction of Statutes, sec. 378.

The foregoing rule is peculiarly applicable where it is contended that a legislature has made a grant, not only by implication, but a grant which its power to make was at least doubtful.

II.

The term "public lands" has been construed by this court so frequently, and it has been so uniformly held that the term does not include anything but uplands over which the public surveys were intended to be extended, that the great importance of this litigation to the State of Washington is our only excuse for replying to the oft-repeated assertion by plaintiff in error that the term includes such areas as he is seeking to appropriate.

In the case of *Newhall v. Sanger*, 92 U. S. 761, the court says:

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

To the same effect are the cases of—

Leavenworth, etc., Ry. v. United States, 2 Otto, 733.
Dubuque, etc., Ry. v. Litchfield, 23 How. 66.
Doolan v. Carr, 125 U. S. 618.

See, also, *McManus v. Carmichael*, 3 Iowa, 1.
Mayor v. Eslava, 9 Porter (Ala.), 577.
Angell on Tide Water, p. 153.
3 Kent's Commentaries, p. 427.
United States v. Pacheco, 2 Wall. 587, 590.
Galveston v. Menard, 23 Tex. 349.
Gough v. Bell, 1 Zab. (N. J.) 156, 162, 163.
Pollard v. Hagan, 3 How. 212, 230.
United States v. Gratiot, 14 Pet. 526, 537.

In that case the court says (p. 537) "The term 'territory,' as here used, is merely descriptive of one kind of

property, and is equivalent to the word 'lands,'" and as we have heretofore shown, the soil underlying navigable waters is not land.

We think that we can confidently assert that no federal decision can be found in which the term "public lands" has been construed to embrace any of the area lying below the line of ordinary high tide.

In fact, an analysis of the cases cited by plaintiff in support of his contention, either that congress has the power to dispose of such area in a territory, or that the term "public lands" can be construed to include anything but uplands, will be found to disclose the fact that they are uniformly dissenting opinions or *dicta*, in which the question at issue was in no wise essential to the determination of the case decided.

The uniform construction placed by the department of the interior upon the term "public lands" has been in harmony with the above authorities.

We take the liberty of quoting from a very elaborate brief filed by Joseph K. McCammon and John P. Gale, Esqs., before the seretary of the interior, *In re Burns*, in which the decisions of the department are very fully collated.

"'Valentine scrip can only be filed for or located upon . . . public lands of the United States, not mineral. Lands of the class under consideration (in limits of unconfirmed private land claims) are not . . . public lands, and therefore Valentine scrip cannot legally be filed '

for the same.' (Commissioner Williamson, Nov. 22, 1876, case of *Throckmorton*, Copp's P. L. L. 1022.)

"'Looking to the equitable intention of the law makers, I am of the opinion that it was intended that the scrip should be located upon any unoccupied and unappropriated public lands, not mineral, which were in a state of nature, and I do not think that congress intended that Mr. Valentine or his assignees should be allowed to locate said scrip in the center of our great cities, and thus absorb its streets, parks, and public improvements.' (*Valentine v. Chicago*, Sec'y Schurz's decision, Feb. 28, 1879, Copp's P. L. L. 1024. See, also, Sec'y Lamar's decision on motion for reconsideration, Jan. 24, 1887, 5 L. D. 382.)

"'The application of Valentine to locate his scrip on the tracts of section 4 is rejected, it being held by this office that *the land being within the incorporated limits of a city, and thus excluded from pre-emption and homestead entry, is also excluded from location by said scrip, being legally occupied and appropriated.*' (Commissioner Williamson's decision, Jan. 12, 1877, *City of Seattle v. McAleer et al.*, Copp's P. L. L. 1306. Affirmed by Sec'y Schurz, March 19, 1879, *Ib.* 1309.)

"'From the cases which I have already referred to, and the opinions which have prevailed respecting the character of this land, . . . it would seem that it ought to be understood by this time that the tract in question, including that part of which lies opposite to section 10, is not public land of the United States, and therefore not the subject of any scrip location whatever.' (Sec'y Teller's decision, June 8, 1883, case of *John Farson*, 2 L. D. 338.)

"(*b*) The lands here in question are not public lands of the United States within the purview of the Valentine scrip act of April 5, 1872, because they are tide lands.

"See commissioner's decision Nov. 19, 1881, case of

Dennis Cook (1 L. D. 323), refusing a survey because the land was not *public* land, being 'sand, salt, marsh and willows.'

"See secretary's decision, October 5, 1882 (1 L. D. 331), affirming the above decision: 'The alleged tract is upon a bay or inlet of the ocean (between two ranchos), both of which have been surveyed, and from the patented limits of both of which it was excluded. It was also excluded from the official survey of T. 11 S., R. 3 W., M. D. M., within which it is alleged to be located, as not being public land, and for reasons stated by the commissioner and because of its "subjection to tidal overflow," the commissioner's decision is sustained.'

"(*c*) The land here in question being now unsurveyed, cannot be taken as unsurveyed land under said act, because it cannot be made 'to conform, when surveyed, to the general system of United States land surveys.' And this for the reason that the land in question does not and cannot come within the general system of the United States land surveys. It is not surveyable land under the general system. The survey of said land and of all land similar in character lying within the limits of the Territory (now State) of Washington, has been expressly and specifically prohibited, at least since April 14, 1875, on which date the commissioner instructed the surveyor general as follows: 'You will also instruct the deputies, when surveying lands bounded by lands affected by the ebb and flow of tides, to extend the lines of surveys only to high water mark.' (Division E., Record, vol. 2, p. 287.)

"In the case of Lakes Kern and Buena Vista, Secretary Lamar, March 3, 1886, addressing the attorney general, recommending suit to vacate certain swamp land patents to California, after stating that by an erroneous survey said patents included lands actually under the lakes, said:

"'Afterwards the state of California sold these lands to

Haggin, the present owner, who, it is charged, proposes to drain said lakes for his own purposes and to the great injury of the surrounding land owners who have purchased from the government of the United States. It also appears that each of these lakes is a large body of water, permanent in character, and will so remain if let alone. The two have an aggregate area of about forty-four square miles, with a depth of upwards of sixteen feet. They are capable of being navigated, and being without interstate or foreign connection, while not navigable waters of the United States, they are clearly navigable waters of the state of California. Therefore, when the United States issued patents for the lands covered by such waters, it exceeded its powers, its patents conveyed no title, because it had none to convey, and are absolute nullities, of no efficacy whatever. See act of March 9, 1850, 9 Stat. 452, admitting California to the union; also, see sec. 2476, R. S.' (4 L. D. 416).

"With much greater force this doctrine applies to the lands here in question, over which the ocean tides ebb and flow.

"And as to this question of the surveying of lands covered by water, the department has gone to the length of refusing a survey of the bed of a 'dried up' lake, affirming the decision of the commisioner that there was 'no law authorizing the survey and disposal of meandered lakes.' Sec'y Lamar's decision, July 12, 1887, case of *G. H. Holland*, 68 L. D. 20."

Other jurists and courts have gone to the extent of holding that the shores and beds of navigable waters cannot be considered *land* in any sense of the term.

Mr. Angell, in his work on Tide Waters, p. 153, says:

"Soil which is flowed by the tide, whether reclaimed from the water or not, is not *land*."

The supreme court of Massachusetts, in *Doane v. Broad Street Association*, 6 Mass. 332, distinctly asserts the same doctrine.

The soil lying below the line of ordinary high tide is the *shore;* it is not land. (Rapalje's Law Dict.; Webster's Dict.)

Says the supreme court of Iowa, in a well considered case:

"The *shore* is regarded rather as part of the water than as land." (3 Iowa, 48.)

The supreme court of Alabama, in construing a dedication of all the *navigable waters*, says:

"What extent of soil is embraced by the dedication? We think it must be so much ground as is covered by the water, not only at low but at high tide; the government surveys extend thus far, and the *shore* is regarded rather as part of the *water* than as *land.*"

"It is believed that there is no instance in which the United States, after having sold the *land* to high water mark, has afterwards asserted a right to dispose of the soil between that and low water mark."

Mayor v. Eslava, 9 Porter, 578.

Again, the same court, p. 599, speaks of a grant extending below high tide as a grant of *navigable waters.* Again, p. 600, speaking of a reservation of *public lands* in that state, it says:

"There is no reservation by the United States of the *navigable waters*, nor the soils under them."

Again, p. 603:

"The *navigable waters* extend not only to low water mark but embrace all the soil that is within the limits of high water mark."

Chancellor Kent says (3 Kent, 427):

"It is a settled principle of the law that the right of soil of owners of land bounded by the sea or on navigable rivers, where the tide ebbs and flows, extends to high water mark, and the shore below high water mark belongs to the state as trustee for the public."

In *U. S. v. Pacheco*, 2 Wall. 590, the court, in construing a grant of land bounded on the west by the bay of San Francisco, says:

"When, therefore, the sea or a bay is named as a boundary, the line of ordinary high water mark is always intended."

These decisions rest upon the well established doctrine that at the line of ordinary high tide the *land* ends and the *water* begins.

See *Galveston v. Menard*, 23 Tex. 349.
Gough v. Bell, 1 Zab. (N. J.) 163.

Under the foregoing authorities it is clear that if Mr. Valentine had been granted all the *land* from the Cascade Mountains to Puget Sound he would have taken only to the line of ordinary high tide.

Can it be seriously contended that Mr. Valentine's grant is more comprehensive than the foregoing?

Surely his right to select and appropriate public lands must end where the *land* ends.

His grant was of "*public lands*," not of public *waters*, nor of public *shores*.

If he may appropriate the soil below high water mark, why may he not make such appropriation anywhere on the bed of Puget Sound? The law knows no other line where private proprietorship ends.

3 Kent, 427.

McManus v. Carmichael, 3 Iowa, 1.

It was the well settled doctrine of the law before the act of 1872 was passed, that the territory below the line of ordinary high tide was *water*, and not *land*, and congress will be presumed to have so understood the law when this grant was made.

III.

But it appears from plaintiff's complaint that the area sought to be selected by him was not unoccupied at the date of his selection. He alleges in his pleading that the defendant in error was occupying the area with a manufacturing establishment. True, it is contended that the defendant in error made no valid appropriation of the area under the general laws of the United States, and was therefore not entitled to hold them as against him.

But why had not the defendant in error acquired title from the United States to the area thus occupied by them under the general laws? Simply because there was no law of the United States under which they could secure

title to this area. The homestead law and the preëmption law both authorized citizens to acquire title to portions of the public lands, upon complying with certain conditions; but the homestead or preëmption laws were never construed to extend to citizens the right to appropriate under those laws any portion of the shores or beds of navigable waters. And it would be the grossest injustice to hold that the term "public lands," as used in the homestead and preëmption laws, under which laws alone the public could acquire title to these areas, excludes the shores and beds of navigable waters, and that the same term when employed in a private grant to Mr. Valentine authorizes him and his legal representatives to acquire title to areas from which the public at large were excluded.

IV.

The area sought to be selected by plaintiff in this case was not unappropriated at the date of the attempted selection, viz., September 23, 1889. On February 22, 1889, congress passed an act authorizing the State of Washington to form a state government and be admitted into the union on an equal footing with the other states.

In pursuance of this, the constitutional convention of the State of Washington adopted and submitted to the people a constitution, in which the state asserted its absolute title to all the shores and beds of its navigable waters; and this in pursuance of express authority conferred by

congress in the enabling act. This constitution was submitted a considerable time before the attempted selection, and was adopted by the people on the 1st of October, a few days later.

And if there is anything in the proposition urged by plaintiff that congress has a greater power of disposition of such areas in a territory than it has in a state, we think that the enabling act of February 22, 1889, amounted to an appropriation, at least of every incident of sovereignty that would attach to the future state.

Again, the area sought to be appropriated by the plaintiff in error in this case is within the corporate limits of the city of Seattle as bounded and described in the act of February 4, 1886 (see Laws of Washington, 1885–6, 238), of which act of incorporation the superior court of King county would take judicial notice, and, of course, every other court, in passing upon the correctness of the decision of that court, must likewise take judicial notice.

And it appears from the authorities heretofore cited that the interior department has uniformly refused to accept the filings of Valentine scrip upon areas lying within the corporate limits of incorporated cities, holding that such land is not only legally occupied, but legally appropriated.

This argument has peculiar force in the case at bar. The area is a part of the harbor of the metropolis of this state. The people of this state, both by their constitution

and laws, have provided for a system of harbor improvements, with which the title asserted by the plaintiff in error in this case would be wholly inconsistent.

This scrip has been located, or an attempt has been made to locate this scrip, upon thousands of acres of the shore of Puget Sound, and if the legal title of these areas were transferred to private citizens, the public improvements contemplated by the constitution and laws of this state would be checked. Waterways for the accommodation of shipping could not be constructed except by the employment of complicated legal machinery and at great expense to the state.

Moreover, when the harbor lines of the city of Seattle are located in pursuance of the constitutional provisions heretofore cited, the area which the constitution actually prohibits from passing into the hands of private individuals might be found to lie in the same area.

It is true the plaintiff in error alleges that it lies between the line of ordinary high and ordinary low tide, but as heretofore seen the law knows no such line of boundary as the line of ordinary low tide, and if a valid appropriation can be made above that line, an equally valid one might be made below that line, and no limit could be fixed to the area which thus might be appropriated to private uses wholly inconsistent with public rights.

Respectfully submitted. W. C. JONES,

Attorney General, State of Washington.

Office Supreme Court, U. S.
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IN THE SUPREME COURT

OF THE

UNITED STATES

MILTON L. BAER, *Plaintiff in Error,*

vs.

MORAN BROTHERS COMPANY, a corporation,
Defendant in Error,

and

THE STATE OF WASHINGTON,
Intervenor,

GEORGE F. DEARBORN,
Intervenor.

ERROR FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF ON BEHALF OF INTERVENOR G. F. DEARBORN.

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THE CALVERT CO., Seattle, Printers

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STATEMENT OF THE CASE.

On the 23d day of September, 1889, while Washington was a Territory, but after passage of the enabling act to erect the State of Washington, plaintiff made application at the local United States land office at Seattle to file Valentine scrip upon the tide lands in Seattle harbor.

The record shows that prior and at the date of this application

a fractional portion of the forty acres of the tide flats sought to be filed upon by plaintiff were occupied by defendants with valuable improvements, in use for business, trade and commerce, and that all of the tide flats lie in front of and in a direct line between intervenor's upland and the deep public navigable waters of Elliott Bay.

ARGUMENT.

We contend the only question involved is, are these tide flats "unoccupied and unappropriated public lands of the United States, not mineral. * * * and, if unsurveyed when taken to conform, when surveyed, to the general system of United States land surveys" within the purview of the act of congress dated April 5, 1872, an act for the relief of Thomas B. Valentine?

Whatever may be their legal character, it is admitted, by the brief of plaintiff and intervenor, they are not mineral, and that a portion of the area involved was occupied, appropriated and in possession of defendant at the time plaintiff attempted to file his scrip over it. The question left is, are they public lands, within the meaning of the statute? If they are, they are public lands subject to pre-emption or homestead, and defendant by his prior occupancy has the preferred right to file upon them, as soon as they are surveyed, in a manner to conform to the general system of United States land surveys: and they could not be acquired by plaintiff.

U. S. vs. Williams, 39 Fed. Rep., 314.

In interpreting the meaning of the words "public lands", we invoke the attention of the court to the uniform course of decisions of the general land office, not as binding upon the court, but as opinions entitled to some consideration:

In the case of Frank Burns, Jr., *10 Land Decisions, 365*, which was an application to locate Valentine scrip upon the tide flats immediately west of plaintiff's filing, Secretary Noble says: "The words 'public lands' of the United States are used to designate

such lands as are subject to sale and disposal under the *general land laws*, and do not include all lands to which the United States may have the legal title, or all lands which may be granted or disposed of by the United States. These words have a well defined meaning, and all grants of public lands are made by the government and accepted by the grantee with a full knowledge of what lands are intended to be thereby conveyed." This opinion is followed in *In re Kasson, 13 Land Dec., 299*, another Valentine scrip filing upon the same tide flats. (In both these cases, the undersigned, writer of this brief, was one of the attorneys resisting the filing. In which cases the land office records contain excellent official maps showing the full character of these tide flats and all filings, including that of plaintiff.)

It is res judicata in the Department of the Interior that Valentine scrip cannot be located on the lake front in Chicago.

In re Valentine, 5 Land Dec. 382.

In re Farron, 2 Land Dec. 338.

In Black's Pomeroy on Water Rights, at page 514, it is said: "The Supreme Court has explicitly declared that the words 'public lands' are habitually used in the federal legislation to describe such lands as are subject to sale or disposition under general laws, (Newhall vs. Sanger 92 U. S. 761). That is, not all lands owned by the general government are 'public lands,' but only such classes of lands—agricultural lands, mineral lands, desert lands, swamp lands, etc.—as have been thrown open to entry or purchase under general acts of congress. Now, there is no general act of congress providing for the sale of tide-lands or lands covered by navigable waters. We must therefore understand that it was the intention of congress, in using the phrase 'public lands' in the Valentine Act, to authorize the location of the scrip only on lands the disposal of which is regulated by general laws, hence necessarily excluding tidal lands. *It will be observed that it is not necessary to raise any question of the power of the United States to dispose of shore lands in a territory. * * * * But the question is solely whether such lands are included in the purview of the act under consideration.*

The general land office has issued, at various times, instructions

concerning the location of Valentine scrip, and the surveys of *public lands* bounded upon waters affected by the ebb and flow of tides.

In the case of Dennis Cook (1 L. D., 323) Commissioner McFarland sustained the refusal of the United States surveyor general, to survey a tract not classed on the township plat as public land, but designated thereon as "overflowed" and on the plat of the county survey as "sand, salt marsh, and willows," and, in the same on appeal, Secretary Teller, October 5, 1882 (1 L. D., 331), said: "The alleged tract is upon a bay or inlet of the ocean, between two ranchos, both of which have been surveyed and from the patented limits of both of which it was excluded. It was also excluded from the official survey of T. 11 S., R. 3 W., M. D. M., within which it is alleged to be located, as not being public land. The plat of survey of said township shows the tract to be overflowed land and the private survey filed by the applicant shows it to be sand, salt marsh, and willows, with but a very small portion of cultivable land, if any. Your decision holds that as the tract has not been heretofore claimed nor classed as public lands of the United States, * * * and also in view of its exclusion from said ranches and of the character of the tract as represented by said surveys and its subjection to tidal overflow, said application should be rejected."

The tract involved in this case is now unsurveyed. The government has surveyed all the dry upland abutting and touching upon the tide flats of which this tract is a portion. A meander line has been established, and thereby the amount and quantity of public lands has been determined. The tract in question has been expressly excluded. It does not and cannot be made to come within the general system of the United States land surveys, and, therefore, it cannot be made to conform to that system and, hence, cannot be taken to be such unsurveyed land as is meant by the Valentine act. This in particular, because the survey of this land and all land similar in character in the Territory of Washington was expressly prohibited by the commissioner in his instructions to the surveyor general, under the date of April 14, 1875, to wit: "You will instruct the deputies when surveying lands bounded by waters

affected by the ebb and flow of tides to extend the lines of surveys only to high-water mark."

Division E, Record, Vol. 2, p. 287.

Secretary Lamar, addressing the attorney-general of California, under date of March 3rd, 1886, in the case of Lakes Kern and Buena Vista, relative to certain patents issued to the State of California under the swamp land act for lands covered by Lakes Kern and Buena Vista, recommended suit to vacate this patent, inasmuch as they included land covered by the waters of said navigable lake. Among other things he said: "It also appears that each of these lakes is a large body of water, permanent in character, and will so remain if let alone. The two have an aggregate area of forty-four square miles, with a depth of upward of sixteen feet. They are capable of being navigated, and being without interstate or foreign connection, while not navigable waters of the United States, they are clearly navigable waters of the State of California. Therefore, when the United States issued patents for the land covered by such waters it exceeded its powers, its patents conveyed no title, because it had none to convey, and are absolute nullities, of no efficacy whatever." See Act of March 9, 1850, (9 statute 452) admitting California into the Union; also see sec. 2476 R. S. (4 L. D., 416.)

Secretary Lamar, addressing Commissioner Sparks July 12, 1887, (6 L. D., 20) sustained the commissioner's decision rejecting an application for the survey of an alleged "dried up lake" upon the ground that there is no law authorizing the survey and disposal of the former bed of a meandered lake and stated that "since 1877 it had been the policy of the department to refuse to survey the beds of meandered lakes, for the reason set forth in the report of the Commissioner of the General Land office for 1877."

In Barney vs. Keokuk, 94 U. S., 338, Mr. Justice Bradley, in giving the opinion of the court, says: "It (the soil below the line of high water mark) properly belongs to the states, by their inherent sovereignty, and the United States has wisely abstained from extending, *if it could extend*, its survey and grants beyond the limits of high water.

In Mann vs. Tacoma Land Co., 44 Fed. Rep., 27, Judge Hanford says: "This statute (Valentine act) authorizes the location and entry of land which at the time of entry either has been or remains to be surveyed and included in the public surveys of the township, according to established and known rules governing the land surveys of the United States. And obviously it was not intended by congress to give Mr. Valentine, his representatives or vendees, any right to acquire title by use of such scrip to any part of a navigable river, channel or harbor, or the bed or shore thereof, situated outside the limits subject to survey according to established rules. As part of a general plan and system for the sale and disposition of the lands of the United States, the laws provide for surveys to be made and officers especially qualified to do that work and charged with official responsibility are assigned to the duty of subdividing the land and locating and establishing boundaries. The lands surrounding this harbor have been by such officers surveyed, and the boundary line between the line and the water of the bay has been by this official survey located and established. The line is approximately the line of ordinary high tide, which, according to all the laws and usages of this country, is the boundary line dividing the land and the water and the limit to which the surveys may lawfully extend. The space which the plaintiff seeks to protect is not surveyed as land, and remains unsurveyed because situated outside this boundary, and it was regarded by the official surveyor as not being land at all, but as water. The work of the surveyors in the field with their plats and field notes has been approved by the Commissioner of the General Land Office, and it is, as to all matters relating to the sale and disposition of the lands of the United States, conclusive and binding upon all persons having to deal with the United States, as well as upon the government itself."

Bates vs. Railroad Co., 1 Black, 204.

As a result of these instructions and decisions, only public lands can be taken by this scrip:

In the City of Seattle vs. McAleer et al. Copp's P. L. L., p. 1306, Commissioner Williamson says: "The application of Valentine to locate his scrip on the tracts in section 4 is rejected, it being held by this office that the land being within the incorporated

limits of a city, and thus excluded from pre-emption and homestead entry, is also excluded from location by this scrip, being legally occupied and appropriated."

"From the cases which I have already referred to, and the opinions which have prevailed respecting the character of this land * * * it would seem that it ought to be understood by this time that the tract in question, including that part of it which lies opposite to Sec. 10, is not public land of the United States, and therefore not the subject of any scrip location whatever." (Secretary Teller's decision, June 8, 1883, case of John Farson, 2 L. D., 338).

"Looking to the equitable intention of the law-makers, I am of the opinion that it was intended that the scrip should be located upon any unoccupied and unappropriated public lands, not mineral, which were in a state of nature, and I do not think that congress intended that Mr. Valentine or his assignees should be allowed to locate said scrip in the center of our great cities, and thus absorb its streets, parks and public improvements." (Valentine vs. Chicago, Sec'y Schurz's decision, Feb. 28, 1879, Copp's P. L. L., 1024. See also Sec'y Lamar's decision on motion for reconsideration, Jan. 24, 1887, 5 L. D., 382).

"Valentine scrip can only be filed for or located upon * * * public lands of the United States, not mineral. Lands of the class under consideration (in limits of unconfirmed private land claims) are not * * * public lands, and therefore Valentine scrip cannot legally be filed for the same." (Commissioner Williamson, November 22, 1876, case of Throckmorton, Copp's P. L. L., 1022.)

These cases show the policy of the land department of the government has been to exclude land covered with navigable waters from the meaning of the term "public lands," and, at the same time, the invariable decision of the land department has been that only public lands of the United States can be taken by Valentine scrip.

Public land means land, not water; not land covered with water,

nor sea shore. "Soil which is flowed by the tide, * * * is not *land.*"

Angell on Tide Waters, p. 153.

The tract in question is known as "Tide-flats," which denotes the land lying below the line of high water, like the shore. It is properly called shore; it is not land.

Rapalje's Law Dict.

Stover vs. Freeman, 6 Mass., 435.

Callis on Sewers, 54, says: "The shore is not counted for lands or grounds gained from the sea, or left by it, because at every full sea it is covered with the waters thereof * * *. Shores and such grounds which *alternis vicibus* are wet and dry are not accounted relinquished grounds." Id., 274.

"*Terra*, land, in the legal signification, comprehendeth ground, soil or earth whatsoever." Coke Upon Littleton, I, 197. "* * * And land covered with water shall be demanded by the name of so many acres *aqua coopertas*, whereby it appeareth that they are distinct things." Id. 200.

In 3 Iowa 48, the supreme court held, "The shore is regarded rather as part of the water than as land."

In Mayor vs. Eslava, 9 Porter 578, the supreme court of Alabama said: "The government surveys extend thus far (high water mark), and the shore is regarded rather as part of the water than land," and that it is believed that there is no instance in which the United States, after having sold the land to high water mark, has afterwards asserted a right to dispose of the soil between that and high water mark.

Whether it be possible for congress to frame an act so as to dispose of tide flats during a territorial period or statehood, seems to us unimportant for the determination of this case. The question is not *could* congress dispose of the tide flats; but *did* congress include them within the meaning of the Valentine act. This act,

though of a private character, relates to the disposition of the public lands, is a part of the great body of the United States land laws and is *in pari materia* with those laws.

The phrase "public lands" in the Valentine act means such land only as is intended and included in those laws which provide for grants and other disposition of the land of the United States. Those laws never apply the phrase public lands to navigable waters nor to the soil thereunder. That the Valentine statute is *in pari materia* with the public statutes controlling the disposition of the lands of the United States, see Endlich on Interpretation of Statutes, Secs. 43, 44, 45, 46, 47, 48, 367.

Assuming from the purposes of the argument that the United States possessed the power to grant the said tide lands to individuals, for private purposes, we maintain further that these lands had been withdrawn from entry prior to vesting of this application.

The record shows that the application of Mr. Baer was made on September 23, 1889, after passage of the enabling act.

By section 8 of an act of congress approved February 22, 1889, and entitled "An act to provide for the division of Dakota into two states and to enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and state governments, and to be admitted into the Union on an equal footing with the original states, and to make donations of public lands to such states," the United States has declared: "and if the constitutions and governments of said proposed states are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the president of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed states, which have adopted constitutions and formed state governments as herein provided, shall be deemed admitted by congress into the Union under and by virtue of this act, *on an equal footing with the original states* from and after the date of said proclamation."

By the passage of this act, the people of the territory of Washington acquired a vesting right to be and become a state upon the performance of certain conditions precedent, and it is worthy of

note that these conditions precedent have been complied with; that the president of the United States has issued his proclamation and Washington has been admitted into the Union *on an equal footing with the original states.*

The facts of this particular case show that there was no recognition whatever on the records of the local land office or elsewhere of the attempted application to locate scrip made by Baer at the date of the proclamation, nor has there been any such payment of money and issue of a receipt as would prevent the passing of title to the tide lands to Washington.

See letter of June 17, 1874, to the Register and Receiver of the United States, which provides:

"Fifth. When the application is made to file said scrip upon unsurveyed land, a description by metes and bounds, together with a map or diagram of the tract applied for must be filed with the application. In such cases the scrip, with the accompanying papers as aforesaid, will be retained in the careful custody of the Receiver until such time as the township embracing the tract applied for shall be surveyed. Within three months from the date of the receipt by the Register of the official plat or survey of the said township the party who may have filed the said scrip will be required to appear before you and designate upon the official plat the specific subdivision embraced in the said filing, whereupon the location thereof will be consummated."

See also letter of June 6, 1876, to the Register and Receiver of Independence, California, which reads:

"In reply to the Register's letters dated the 15th of July and the 4th of August, 1875, relative to the location of Valentine scrip, I hereby direct that when this class of scrip is filed in your office for unsurveyed land you will issue a receipt for such scrip of the party filing the same.

"When the scrip filed for unsurveyed lands is subsequently adjusted to the official survey you will issue a duplicate certificate of location to the locator in each case."

In other words, there was no vested right acquired by Baer at the date of the proclamation of the president admitting Washington to the Union, when the trust ceased and the title vested.

Congress might have excepted in the grant to the State all pending applications to locate on tide lands or other land claims under inchoate title, but it would take an exception in terms to prevent the full operation of the act.

In the case of Bagnell vs. Broderick (13 Peters, 436), Judge Catron says:

"Congress has the sole power to declare the dignity and effect of the titles emanating from the United States, and the whole legislation of the federal government, in reference to public lands, declares the patent superior and conclusive evidence of legal title; until its issuance the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment."

In the case of Frisbie vs. Whitney (9 Wallace, 187), the Court held:

"Congress can dispose of land at any time prior to the settler obtaining a vested right."

"The learned Court, whose decision we are reviewing, place their judgment on the ground that, before the passage of the act, the complainant had acquired a vested right in the land, which could not be divested by any legislation of congress. On the other hand it will hardly be contended that anything short of a vested right in this land could deprive congress of the right which it has as owner and holder of the legal title, and, by the express language of the constitution, to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. The essential inquiry in this case, therefore, is whether complainant had acquired such a vested right before congress, by law, withdrew these lands from the operation of the pre-emption acts."

The Court answered the question by showing that the complainant had not complied with the provisions of the Act before the

withdrawal of the lands from the operation of the pre-emption law. Thereupon the Court say:

"The Courts may very properly correct the injustice done by the land officer, by refusing to record rights, however incohate, which are protected by laws still in existence; while they can only consider vested rights when those rights are sought to be enforced in opposition to the repeal or modification of the laws on which they are founded.

"The argument is urged with much zeal, because complainant did all that was in the power of anyone to do towards perfecting his claim, he should not be held responsible for what could not be done.

"To this we reply, as we did in the case of Rector vs. Ashley, 6 Wall., 142 (U. S., XVIII, 733), that the rights of a claimant are to be measured by the acts of Congress, and not by what he may or may not be able to do; and if a sound construction of these acts shows that he has acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient. That was a case, also, in which it became important to ascertain when a right of public land became vested, and, though it arose under statutes somewhat different from the general pre-emption law, the principles asserted there and in the previous cases of Bagnell vs. Broderick, 13 Pet., and Barry vs. Gamble, 3 How., 32, strongly support our conclusion in the present case."

There has been considerable controversy over the manner in which Washington Territory was acquired—whether by discovery of the valley of the Columbia river in 1792, or under the treaties with France in 1803 and with Spain in 1819. The whole question is fully presented in Bancroft's History of the Northwest, Greenhow's History of Oregon, and History of Oregon in American Commonwealth series. But it is probably of little concern, as we

believe any court would hesitate long before it held the United States did not owe the same duties to the people of any territory, whether acquired by purchase or treaty.

If it be correct that the records of the land office show Washington Territory was acquired as a part of the Louisiana purchase, then the distinction between an express and an implied trust drawn by the plaintiff's brief fails; because in the treaty with the French Republic, dated April 30, 1803, ceding Louisiana, Article III. provides:

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess."

This language, we contend, means that the United States stipulated that Washington Territory should be incorporated into the Union and that the inhabitants thereof should be clothed with all the rights and advantages of citizens of the original States, and that among those rights and advantages was the right and attribute of State sovereignty equal in scope and entirety with that of the original colonies, and that such State sovereignty includes the ownership of all tide lands, and, therefore, the State of Washington, upon her admission into the Union, acquired title to the lands in controversy.

We present the following citations and quotations to sustain this contention:

In County St. Clair vs. Livingston (23 Wallace 46, 68) the Court says:

"By the American Revolution the people in each State in their sovereign character acquired the absolute right to all their navigable waters and the soil under them; the shores of navigable waters and the soil under them were not granted by the constitution of the United States but were reserved by the States respect-

ively, *and new* States have the same rights of sovereignty and jurisdiction over this subject as the original ones."

In Barney vs. Keokuk (94 U. S., 338) the Court says:

"It (shores of navigable waters) properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending, *if it could extend*, its survey and grants beyond the limits of high water."

In Mumford vs. Wardell (6 Wallace, 436) the Court says:

"The settled rule of law in this court is that the shores of navigable waters and the soils under the same in the original states were not granted by the Constitution of the United States, but were reserved to the several states, and that the new states since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original possessed within their respective borders."

"Although the title to the soil under the tide waters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, *they held it only in trust for the future state.*" (Reaffirmed in Bridge Co. vs. United States, 105 U. S., 490).

In Pollard vs. Hagan (3 Howard, 230) the Court says:

"This right of eminent domain over the shores and the soils under navigable waters, for all municipal purposes belongs exclusively to the states within their respective territorial jurisdiction, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the state of the power to exercise a numerous and important class of police powers."

Affirmed, Woodruff vs. Mining Co., (18 Federal Reporter 778).

In Withers vs. Buckley (20 Howard, 84) the court says: "Clearly, congress could exact of the new state the surrender of no attribute inherent in her character as a sovereign, independent

state, or indispensable to her equality with her sister states, necessarily implied and guaranteed by the very nature of the federal compact. Obviously, and it may be said primarily, among the incidents of that equality, is the right to make improvements in the rivers, watercourses and highways, situated within the state."

See Mobile vs. Emanual, 1 Howard, 95.

In Martin vs. Waddell (16 Peters, 414) the court in constructing the King's grant to the Duke of York, says:

"This opinion is confirmed by referring to similar grants for other tracts of country upon this continent, made about the same period of time. Various other charters for large territories on the Atlantic coast were granted by different monarchs of the Stuart dynasty to different persons for the purposes of settlement and colonization, in which the powers of government were united with the grant of territory. Some of these charter very nearly resemble in every respect the one now in controversy, and none of them, it is believed, differed materially from it in the terms in which the bays, rivers and arms of the sea and the soils under them, were conveyed to the grantees; yet in no one of these colonies has the soil under its navigable waters and the rights of fishing for shell fish, or floating fish, been reserved by the leters-patent from the powers of government. In all of them from the time of the settlement to the present day, the previous habits and usages of the colonies have been respected, and they have been accustomed to enjoy in common the benefit and advantages of the navigable waters for the same purposes and to the same extent that they have been used and enjoyed for centuries in England. Indeed, it could not have been well otherwise, for the men who first formed the English settlements could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property, and the settler upon the fast land thereby excluded from its enjoyment and unable to take a shell-fish from its bottom, or fasten there a stake, or even bath in its waters without becoming a trespasser upon the rights of others."

In Chapin vs. Bourne (8 California, 296) the Court says:

"It (title of water property) belonged to the United States, who held it in trust for any new State that might be erected out of said territory and passed to the State of California on her admission by virtue of her sovereignty."

See Le Roy vs. Dunkley, 54 California, 452.

In Hinman vs. Warren (6 Oregon, 411) the Court says:

"Tide lands—those that are uncovered and covered by the ebb and flow of the sea—belong to the state of Oregon by virtue of its sovereignty. This doctrine is the clear result of the principle announced in all the cases from Pollard's Lessees vs. Hagan (3 How., 230), to Barney vs. Keokuk (4 Otto, 324).

"But it is contended that this sovereignty did not attach until the State was admitted into the Union. This is true, but it is also equally true that the United States government has no constitutional or statutory authority to so act towards a Territory, or so dispose of the lands within a Territory or as to make it impossible to admit such Territory upon an equal footing with the other States of the Union. In all matters which touch the sovereignty, the general government is, in the very nature of our system, simply a protector thereof until the Territory assumes the ampler powers of a State, and becomes thereby enabled to assert and protect its own sovereignty."

In this case the patent was issued by the United States in 1850. Oregon did not become a State until 1859. The patent was declared void for the reason quoted supra.

In Steam Engine Co. vs. Steamship Co. (12 R. I., 359) the Court says:

"And such I think is not the meaning of the Courts; they have often enough held that the property of the King, and, with us, of the State, is a trust for the public, a power to control and regulate, to subserve the good of the public, and not a private property.

Says Kent, 'the King of England, and here the State, is *trustee* for the public,"

In Haight vs. Keokuk (4 Iowa, 213) the Court says:

"It has been said that the Government cannot convey the land between high and low water mark on the public or navigable rivers. * * * * Although no State may exist at the time of such grant as in this case, yet grants and sales made under such circumstances are to be construed as having a view to the future sovereignty which may or will arise, and so as not to impair its rights when arisen.

In Attorney General vs. City of Eau Claire (37 Wisconsin, 447) the Court says:

"Public rivers are highways by no local authority. * * * They are in charge of the state and the state cannot abdicate its charge of them. That charge is a duty to the Federal government and a *trust* for the whole people, not the state only, but of the several states."

In State vs. Sargent (45 Conn., 372) the Court says:

"By the common law as it stood long before the coming of our ancestors to this country and the settlement of the colony of New Haven, the king, as *parens patriæ*, held the soil under the sea between high and low water mark. He held it not for his own benefit, but for his subjects at large and for the subjects of all the states at peace with him; *he held it in trust for public uses.*"

In Seabury vs. Field (1 McAllister, 5) the Court says:

"That this state (California) on her accession to this confederacy, became subrogated to all the rights, political and territorial, in the water property which had been heretofore in the United States government after the treaty of Guadalupa Hidalgo."

In Bissell vs. Henshaw (1 Sawyer, 579) the Court says:

"By the admission of California into the Union it became, by virtue of its sovereignty, entitled to *all* the lands below ordinary

high-water mark, according to Pollard's Lessees vs. Hagan (3 Howard, 212) and other cases."

See Griffin vs. Gibb (1 McAllister, 224).

In Van Brocklin vs. State of Tennessee (117 U. S., 168) the Court says:

"The rights of local sovereignty, including the title in lands held in trust for municipal uses, *and in the shores of navigable waters below high-water mark*, rest in the state and not in the United States."

In Huse vs. Glover (119 U. S., 546) the Court says:

"That on her admission she (Illinois) at once became entitled to and possessed of *all* the rights of dominion and sovereignty which belongs to the original States."

In State of Illinois vs. Illinois Central R. R. (33 Federal Reporter, 753), the Court says:

"The United States took the right, title, and claim as of soil, as of jurisdiction, which the commonwealth of Virginia had in the North West Territory, for the purposes only of temporary government and in trust for the performance of the stipulations and conditions imposed by the deed of session. * * * One of these conditions was that the territory so deeded should be laid out and formed into States. Consequently when Illinois was admitted into the Union, 'upon the same footing with the original States in all respects whatever,' she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Virginia possessed at the date of the cession. * * * Nothing remained in the United States but the public lands, and if an express stipulation had been inserted in the agreement granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a State."

In Bridge Co. vs. United States (105 U. S., 490) the Court says: "Upon the admission of California into the Union upon equal

footing with the original States, absolute property in, and dominion and sovereignty over, *all* soils under the tide waters within her limits passed to the State. * * * The same doctrine was previously asserted in Pollard's Lessees vs. Hagan, 3 How., 212; in Martin vs. Waddell, 16 Peters, 367; in Mumford vs. Wardell, 6 Wall., 423, 436."

These decisions, taken in connection with the authorities cited by the plaintiff, show that there is a conflict of authorities as to the power of a sovereign to make a grant of land, covered by navigable waters, to a citizen; but since the time of Magna Carta the majority view of the courts of this country has held that the King could not make a valid grant of the shore or the ocean below high water mark.

The same rule prevailed upon the continent. In Mr. Jefferson's pamphlet in reference to the batture or beach of the Mississippi in front of New Orleans, which is printed as an appendix to the eighth volume of his works, he makes copious citations from the civil law, and at page 541 he states the rule, upon the authority of Vattel, as follows:

"It ought to be observed, however, that so far as respects the bed and navigation of rivers the right vested in the sovereignty is a mere trust. It is not alienable—like roads, canals, public buildings."

At page 569 he quotes the Institutes and Digest to sustain this proposition: "As to the bed of the river, there can be no question but that it belongs purely and simply to the sovereign as the representative and trustee of the nation. If the river deserts its bed, the Roman law gave it to the adjacent proprietor, and the law of France to the sovereign; but while it is occupied by the river, all laws, I believe, agree in giving it to the sovereign, not as his personal property to become an object of revenue or alienation, but to be kept open for the free use of all the individuals of the nation."

Whatever power congress has to "dispose of the territory or other property belonging to the United" States is found in section 3 of article 4 of the constitution; "but this grant of power must be

construed in subordination to the other provisions of the constitution and with reference to the doctrines of public law, as understood by the men who framed that instrument. Under the decision of this court in Prosser et al. vs. Northern Pacific R. Co. it may not be doubtful that this court would sustain, as constitutional, an act of congress which made a grant of a specific and designated portion of the shore to a private citizen for the purpose of improving a harbor by the erection of wharves or piers in furtherance of public navigation, trade and commerce. But it is not necessary for us to deny the power of the government to take upon itself the duty of improving the facilities of the harbor of a territory. The extent of the present contention merely goes to the point that it would not be competent for congress to grant away the sea shore, covered by the navigable water, by a general law, making no provision for the protection of the rights of the riparian owner or of the public, subjecting the people of the future state, and the people of the United States, to the exactions of private grantees, without limitations or control.

It will also be remembered that the grant of powers to the federal government was only made to promote the *general welfare.* If it were necessary, therefore, to decide the question, it is submitted with great confidence, that had it been the intent to authorize the location of the Valentine scrip, at pleasure upon lands covered by the tide-waters of the United States, an act of congress, framed as this act is, to carry out such intention, would be declared unconstitutional.

It is, however, unnecessary for counsel to discuss, or the Court to decide, the question of the power of Congress. What might be the power of the United States in case this had been a deliberate and intelligent exercise or discretion in making a grant of tidal lands, for the purpose of improving a harbor or facilitating commerce, need not be considered.

The act of 1872 is not of this character. Like all grants involving the rights of the State and the public, it has to be construed strictly. This rule is more familiarly enforced in the construction of charters, and has never been stated more tersely and more

vigorously than by Chief Justice Black in Commonwealth vs. Erie & Northern Railroad Company, 3 Casey, 339, where he says that "a doubtful charter does not exist, because whatever is doubtful is decisively certain against the corporation," and added that "the lawyer who is not familiar with the numerous authorities upon it, to be found in book of reports, will probably never become so; and the citizen who does not believe it to be a most salutary feature in our jurisprudence, would hardly be convinced though one rose from the dead." This Court has maintained the same doctrine. The cases are collected in notes to section thirty-six of Gould on Waters.

It has been invariably held that under the general laws of the States the land could not be appropriated under the bed of navigable rivers.

Freytag vs. Powell, 1 Wharton, 536.

Poor vs. McClure, 77 Penn St., 219.

Norfolk City vs. Cook, 27 Grattan, 433.

Chapman vs. Hoskins, 2 Maryland Chancery, 485.

Taylor vs. Langley, 40 Cal., 471.

Haight vs. Keokuk, 4 Iowa, 213.

Meyers vs. City of St. Louis, 8 Mo. Ap., 266.

Chapman vs. Hoskins, *ut supra*, is a specially instructive case:

The syllabus reads: "The land for which a patent was sought in this case, was covered by navigable waters and so situated that in case the waters should recede, the rights of a riparian owner would attach. Under these circumstances a grant was refused upon the ground that it could convey no substantial right and its only effect would be to tempt the grantee into a contest with the riparian owner, or to interfere with the public right of fishing and navigation, which the State can neither destroy nor impair."

In conclusion it will be remembered that the Valentine act of 1872 is to be treated as in *pari materia* with the acts of congress relating to the public lands, and the acts relating to pre-emp-

tion and to homesteads, all assume capacity for survey, settlement, and occupation as the necessary characteristic of the lands to be taken up under their provisions. Since it appears in this case from the United States coast and geodetic surveys, the surveys of public land, and the records of the general land office in this filing, that all the land sought to be entered by this application is covered by the navigable waters of Puget Sound and is all below the line of ordinary high tide, and largely below the line of ordinary low tide, not separated from the main land by any channel, nor what might be called delta land (since at ordinary high tide the water appears to be some ten feet deep over the entire claim, and incapable of producing vegetation or being reclaimed as agricultural land), and is not capable of being appropriated for pre-emption or homestead purposes, it follows that it cannot be regarded as public lands within the meaning of the land laws of the United States.

That these lands are different in character from "public lands" for sale was strongly shown in Illinois Central Railway Company vs. State of Illinois S. C. Reporter, 13, 110, 118, in which Justice Field, speaking for the court, says: "That the state holds the title to the lands under the navigable water of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide-water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them, whenever the lands are subject to use. But it is a title different from the title which the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state. * * * The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial improvement of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and water remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. * * * So with trusts connected with public property, or property of a special character, like lands

under navigable water cannot be placed entirely beyond the direction and control of the state."

PREEMPTIVE AND LITTORAL RIGHTS OF DEARBORN.

Plaintiff's filing covers that portion of the tide flats lying between the deep navigable waters of Puget Sound and directly in front of the upland, owned by intervenor, Dearborn, which abuts and touches on the navigable waters which flow over the tide flats in question.

In the act of the legislature of Washington entitled, "An Act for the apprisement and disposing of the tide and shore lines belonging to the State of Washington," approved March 26, 1890, it is provided in section 12, "when the abutting upland owner has attempted to convey by deed to a bona fida purchaser any portion of the tide flats in front of such uplands or *littoral rights therein*, such right of purchase herein given to the upland owner shall be construed to belong to such purchaser, or to any person, association or corporation claiming by, through or under such purchaser, to the extent of the tract or rights so conveyed."

The constitution of the State of Washington, duly accepted by the people of the State, provides for the creation of a harbor, and the improvements necessary for the commerce of the harbor, in the following language: Article xv, (Harbor and Tide Water) Section 1. "The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays, and inlets of this State, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof upon either side. The State shall never give, sell, or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred

feet of such harbor line (as the commission shall determine), be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce.

"SEC. 2. The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks, and other structures, upon the areas mentioned in section one of this article, but no lease shall be made for any term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks, and other structures."

Wherever, therefore, the inner harbor line, as established by the proper commission, is not the shore line, the area between is not deemed necessary, nor is it appropriated, for harbor purposes or the purposes of commerce. Whatever is within the harbor line, when established, is what the State selects as necessary for commerce, and, having selected no more, the remainder, at least, of the tide land area, under all the decisions, should be subject to the right of ingress and egress of the upland owner to the harbor or deep water. The interest of the State, as this Court has well said, is to aid and protect the freedom of commerce.

It might be mentioned here, as going strongly against appellant's contention, that the harbor lines have not as yet been established, and consequently there is nothing to show this Court that the identical tract claimed by appellant under his scrip filing may not be included within the harbor line, when established. The granting of his right to file may, therefore, operate to prevent the State from locating its harbor as by the constitution it is provided.

This was a recognition and grant by the people and the State Legislature of the existence of littoral rights in this State belonging to the upland owners, as incident and appurtenant to abutting upland.

It is admitted by the record and will appear from Dearborn's petition, that he deraighns his title to the upland, under the land laws of the United States and, in particular, under the Donation Act of Sept. 27, 1850, (9 U. S. Statutes, pages 496-500) by chain of

title leading from that particular claim, known as the "Maynard Donation Claim." If there be a common law littoral right, Dearborn's upland should carry it, since the common law was expressly adopted by the legislative assembly of the Territory of Washington, except where repugnant to or inconsistent with the Constitution of the United States, laws and treaties of the United States, and the Organic Act, (Laws of the Territory, as shown in the Civil Practice Act of Jan. 28, 1863, and in the Session Laws of Washington Territory, 1862, 1863 and 1883). These cited laws were continued in force by the Constitution of Washington in Article XXVII, section 2, which reads: "All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or appealed by the legislature."

The common law is a part of the fundamental law of the United States, except in so far as the same is inconsistant with, or repugnant to her constitution and laws. A patent of the United States, therefore, gave to the upland land owner as patentee all common law rights incident to such ownership, consistent with the laws of the United States. Therefore, if these littoral rights existed they passed by patent to the original patentee, and are rightfully claimed and exercised by Dearborn who admittedly deraighns his title from the patentee, and is conceded to possess all the rights which the original patentee had and possessed, and were vested in him long before Washington became a State, and long before Baer made his application on September 23, 1889, and we do not understand this position to be inconsistent with the recent decision of this Court in Bowlby vs. Shirely, decided March 5th, but which has not reached the writer at this distance.

While States may, as held in Parker vs. Bird, 137 U. S., 661, 669, and Ohio Life Insurance Co. vs. Detroit, 16 How. 432 determine all questions of property rights incident to estates bordering on navigable waters, within the jurisdiction of such States, still the States are subject to the limitation that their rules do not impair the efficacy of the grant, or the *use* or *enjoyment* of the property by the grantee, and further that they do not impair previously vested rights ; hence, federal courts will construe grants of

the general government without reference to the rules of construction adopted by the States for such grants by them :

Packer vs. Bird, 137 U. S., 661, 669.

Gormley vs. Clark, 134 U. S., 338.

Yich. Mo. vs. Hophiss, 118 U. S., 356.

Jefferson Brant Bank vs. Shelly, 1 Black, 436.

All will concede that land bordering upon the sea shore has particular value and inducements for the pioneer from that fact. It was on the shores of Puget Sound and Elliott Bay that the first settlement was made in what became the new Territory of Washington, girt with water upon one side and fringed with impassable forests on the other. Here, upon land connected by the ocean road way with all the ports of commerce, the pioneers first settled and radiated about them those spokes of commerce and trade which ultimately subdued the savage territory and gave a new State to the government of the United States. It was their right to settle upon the sea shore, embark, and land from and on this upland all the traffic, trade and commerce of the commercial world which they could handle. It was the particular advantage of littoral rights in furtherance of trade which planted these towns upon the shores of Puget Sound which have been nurtured into magnificent cities by the industry and hardihood of the very men, who are now told that, by virtue of their ownership of sea bounded land, they have no rights peculiar to themselves, as belonging to such land granted by the government; that strangers and trespassers may go upon the sea shore in front of them, fence them off from the commerce of the world, and shut them in as interior property owners and impair the efficacy of their grant and the use and enjoyment of their property, and that there is no remedy for them.

Whatever the policy of the state may be (and it certainly has the right to shape its career in so far as it does not infringe upon Federal law, the policy of the national government and the Constitution and laws of the United States) it has no authority to ignore and deny vested rights under Federal laws, which have long been enjoyed by the settler upon government granted lands; and

it is sufficient to say the Federal courts will protect such rights as intervenor claims, if it can be shown that the right exists.

In Martin vs. Waddell (16 Peters, 414) the Supreme Court of the United States declared that "the men who first founded the English settlements would not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people its bays, banks and rivers, if the land under the water at their very door was liable to immediate appropriation by another as private property, and the settler upon the fast land thereby excluded from its enjoyment and unable to take a shell fish from its bottom or fasten there a stake or even bathe in its waters without becoming a trespasser upon the rights of others."

* * * * * * * * * *

They are rights *jure naturæ*.

In Lyon vs. Fishmongers Co., 17 Eg. Rep., 51, Lord Selborne said: "I am of the opinion that private riparian rights may and do exist in a tidal navigable river. But the rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because this land has by nature the advantage of being washed by the stream; but if the facts of nature constitute the foundation of the rights, I am unable to see why the law should not encourage and follow the course of nature in every part of the same stream—with respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights, properly so called, because the word 'riparian' is relative to the banks and head of the stream, and the connection when it exists, of property on the banks with property in the bed of the river does not carry with it any exclusive right of property in running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having access to it. It is of course necessary for the existence of a riparian right, that the land be in contact with the flow of the stream. Even if it could be shown that the riparian rights of the proprietor of land on the bank of a tidal navigable river are not similar to those of a proprietor above the flow of the tide, I should be of the opinion that he had a right to the river frontage belonging by nature to

his land although the only practical advantage of it might consist in the access thereby afforded him to the water for the purpose of using, when upon the river, the right of navigation common to to him with the rest of the public. *Such a right of access is his only and his by virtue and in respect of his riparian property; it is wholly distinct from the public right of navigation.*

See also Metropolitan Board of Works vs. McCarthy 7, House of Lords 243.

This court in Yates vs. Milwaukee, 10 Wall 497, has said, "whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor where land is bounded by a naligable stream; and among those rights are access to the navigable part from the front of his lot, the right to make a landing, wharf or pier for his own use and for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be."

In view of the great importance of the decision in Yates vs. Milwaukee, we wish to explain why we think it is applicable to this case. It decides the rights of a land owner on a non-tidal fresh water lake. It may be urged that the same principles of law do not apply to a salt water arm of the sea where the tide ebbs and flows. We respectfully submit that there neither is nor can be the slightest distinction and that the Supreme Court of the United States, in declaring the rights of a land owner on Lake Michigan, at the same time, defined the rights of a land owner on Puget Sound.

Under the English law, which was our common law, waters were divided into two classes, to-wit: Navigable and non-navigable. There is a great distinction in the law of riparian rights when applied to these two classes of water; when applied to non-navigable waters, we find the title of the bed in the bank owner and, of course, where he owns the bed he can maintain a wharf on the bed which he owns and also enjoy a right over his own property; but on navigable waters the bank owners title stops at high and low water and with the loss of his title to the bed, he parts with many riparian rights which are exercised in and on the other class of

waters; so that the distinctive difference in the law is occasioned by the ownership or non-ownership of the bed. The English law holds that all waters were non-navigable except where the tide ebbs and flows ; in other words, that in fresh water the title to the bed was in the bank owner and on salt water that title was in the public ; hence, the old distinction between fresh and salt water in applying the doctrine of riparian rights. It is manifest that the question involved in the case at bar, viz. the existence of rights of access and wharfage on waters, where the title to the bed is in the public never could have arisen in England, except in salt water, nor could the question have arisen in this country other than on salt water, until the English common law rule as to the title of ownership of the bed had been modified. In applying these English rules of law to our great lakes and rivers, it was soon found necessary to change the English law, and this Court declared that all water navigable in fact, should be navigable in law. The effect of this on Lake Michigan, was to divest the abutting land owner of his title to the center of the lake and vest it in the public, and it placed Lake Michigan and Puget Sound in the same situation in that respect. Therefore, when the case of Yates vs. Milwaukee came to be considered by this Court the same question arose in that case as is involved in this discussion, viz. what rights attach to ownership of lands abutting upon waters, where the bed under those waters is vested in the public. The Court held he had rights of access over this public navigable lake and that he had a right to construct and maintain a wharf upon its bed, no matter whether the title was in the public or not. In the case at bar we have the same material facts, to-wit : The owner of land abutting and touching upon navigable water, and the title to the bed in the public, and neither practically or theoretically, can we see why there should be any distinction in applying these broad principles of law, because, in the one case, the water is fresh, and rises and falls only at certain periods of the year, and, in the other, the water is salt and rises and falls daily. We, therefore, assert, with great confidence, that the case of Yates vs. Milwaukee and all other fresh water cases, where the title to the bed is in the public, are direct precedents, involving the exact point at law, and that no distinction can be made between fresh and salt waters ; at least, in the words of Lord Selborne, in Lyon vs. Fishmonger L. R. I App. cases, 662 :

"The general law as to riparian rights is not stated by any authorities, that I am aware of, in terms which require this distinction, and if there are any sound principles on which it ought to be made the burden of proof seems to lie on those who so affirm. In support of our position that these same rights do exist on tidal salt waters, we respectfully call the court's particular attention to the cases cited below, from which we quote:

In Weber vs. Harbor Commissioners (18 Wall, 57) Mr. Justice Field, in the opinion of this Court, says:

"It is unnecessary for the disposition of this case to question the doctrine that a riparian proprietor, where land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land and to construct a wharf or pier projecting into the stream for his own use, or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public, as was held in Yates vs. Milwaukee (10 Wall, 497). On the contrary, we recognize the correctness of the doctrine as stated and affirmed in that case."

In Case vs. Taftus, 39 Fed. Rep. 730, the Circuit Court of the United States said: "The plaintiff is the owner of land abutting on the 'shore' of 'Yaquina Bay' (an arm of the Pacific Ocean on the west coast of Oregon). How he acquired it does not appear, and it may not be material, but the title must be derived from the United States, under some act of congress providing for the disposition of the public lands in Oregon. Be this as it may, as a littoral proprietor he has a right of access from his premises to the water, and to erect and maintain a private wharf there, at which to land and embark, so long as he does not materially interfere with the right of the public, and subject to the power of the legislature to regulate such use or privilege."

To the same effect:

State of Illinois vs. Illinois Cent. R. R. Co., 33 Fed. Rep. 730.

Tuch vs. Olds, 29 Fed. Rep. 738.

Bowen's Lessee vs. Mather, Second McLean 376.

In the case of Wilson vs. Welch 12 Ore. 344, 353, the court said: "A shore owner upon the tide water, or upon a navigable stream, possesses rights, which, of late, are conceded to be property. They are not rights, as has often been supposed, that were derived from the state, though held and enjoyed in subordination to the rights of the public. The embarrassing feature of this subject has arisen out of a misunderstanding of the nature of the state's ownership of land, between high and low water upon navigable streams. It has been spoken of as an ownership in fee, and an erroneous impression has been conveyed. The state does own the channel of the navigable river within its boundaries, and the shore of its bays, harbors and inlets between the high and low water mark, but its ownership is a trust for the public. It cannot sell them so as to deprive the public of their enjoyment, (Steam Engine Co. vs. Steamship Co. 12 R. I. 348,) nor can it take away riparian rights except for the public use, and by giving just compensation. Too much importance, I apprehend, has been attached to the tide land act (viz: The Oregon act providing for the sale of tide lands) before referred to. I seriously doubt whether that act confers any new right upon the shore owner in such cases, although he has purchased the land in front of him in accordance with its terms. The title he obtains is subordinate to the public right of passage and navigation, and he had the same wharfage privileges before as afterwards, and the right to protect his upland from the encroachment of the sea. According to Hale there are three sorts of rights in ports and shores:

First.—The jus privatum, or right of property.

Second.—The jus publicum, or public right of passage navigation.

Third.—The jus regium, or government right.

The State could not, by a sale of the shore of water below high tide, deprive itself of the latter right, nor, as before suggested, could it deprive the public of the right of passage or navigation. What then, can such a sale of that character of tide land amount to? I doubt very much whether a sale in such a case could be made to an outside party that would deprive the riparian owner of any right to the enjoyment of the land.

Parker vs. West Coast Packing Co., 21 Pacific Reporter, 822.

The Supreme Court of California, in Shirley vs. Bishop, said:— That the owner of lands bordering on the Straits of Carquinez has a right to free access to the navigable water of said Strait, of which he cannot be deprived without compensation, and any interference with the enjoyment thereof, as by means of the erection of a wharf, cutting off his right of access, is a nuisance, and may be restrained by injunction.

The Supreme Court, in Rhode Island, held that the riparian owner of land bounded by navigable water has a right of access to such navigable water, of which he cannot be lawfully deprived; and any one doing anything in front of the land of such riparian proprietor which makes it less accessible, is liable in damages therefor.

Clark vs. Peckham, 10 R. I., 35.

In Dalaplaine vs. C. & N. W. R. R. Co., 42 Wis., 214, the Supreme Court decided that the riparian proprietor, upon a navigable lake, takes the land only to the water's edge and that the shore is owned by the State, and yet decides also that such riparian proprietor has the exclusive right of access to the front of the lake in front of his land, and to build there piers and wharves, in aid of navigation, and that such a right is a vested one, is valuable and cannot be materially impaired for public use without making compensation, and, that the owner of the bank bordering upon tide water has rights which are not different in any essential respect from the rights of the riparian owner of banks of non-tide or even non-navigable streams.

See Bowen vs. Surnitts, 42 Wis., 243.

Detroit vs. N. W. N. R. R., 42 Wis., 248.

In Carli vs. Stillwater Street Ry. Transfer Co. (28 Minn., 373) the Supreme Court of Minnesota held "that the owner of land bounded by a navigable stream has certain rights which spring from the ownership of the bank and are not dependent upon a strict legal title in him to the soil covered by the water and that these rights are property and cannot lawfully be taken for the public use without compensation."

The same Court in Brisbine vs. St. Paul & Sioux City R. R. Co. (23 Minn., 114) held the upland owner to have the following rights:

The rights to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain for his own public use suitable landing places, wharves and piers on and in front of his land and to extend the same therefrom into the river to the point of navigability, even though and to that extent exclusively to occupy for such and like purposes the bed of the stream, subordinate and subject only to the rights of the public.

In Miller vs. Mendenhall (44 N. W., 1141) the Court held: "That right of access and communication with navigable waters which pertains peculiarly to the ownership of the upland, in order to be available and of practical use, necessarily includes the right to fill in and to build wharves and other structures in the shallow water in front of such land and below the low-water mark, and the exercise of such rights, though subject to state regulation, can only be interfered with for public purposes."

This doctrine is distinctly affirmed in Tinnicum Fishing Co. vs. Carter, 61 Penn. St. 21, in which Sharswood, Justice, in the opinion at page thirty, says: He (riparian owner) has no right to make any erection between high and low water, without express authority from the State, nor of course, beyond low water mark into the bed of the channel. She State can grant authority to make such erection, either to the riparian owner or to others, so long as the riparian owner is not thereby deprived of access and use of the river as a public highway, which is implied if not expressed, in the grant to him of land bounded on the stream."

Pittsburg vs. Scott, 1 Barr, 314.

In Mather vs. Chapman, 40 Conn., 382, the Court said: "It is conceded that by the settled law of Conn. the title of the riparian proprietor terminates ot ordinary high water mark. It is also conceded that although his title in fee thus terminates, *yet he has certain privileges in adjoining waters.* Among the most important of these privileges are:

1st, that of access to the deep sea.

2nd, The right to extend his lands into the water by means of wharves, subject to the qualification that he thereby does no injury to the navigation of the waters by the public."

See State vs. Sargeant, 45 Conn,, 358

While it has been held, in New Jersey, the State may deprive the owner of his reparian rights without compensation, yet that State *recognizes the right of the riparian owner to an injunction against a mere trespasser upon his shore.*

Stockton vs. Browning, 18 N. J. Eq., 390.

New Jersey Zinc & Iron Co. vs. Morris Canal Co., 15 Atl. Rep., 227.

Iowa maintains the same doctrine.

Musser vs. Hensley, 42 Iowa, 356.

Indiana has laid down the same principle.

Bainbridge vs. Sherlock, 29 Ind., 364.

In Washburn on Real Property, Vol. III., (5th Ed.) page 45, it is said : "If the boundary be on a navigable stream—that is, one in which the tide ebbs and flows—the land extends only to the water's edge at high water mark. But he (the riparian owner) would have a right of access to the navigable part of the stream in front of his lands, and to construct wharves and piers projecting into the stream for his own use, subject to such general rules and regulations as the legislature may prescribe for the protection of the public."

In the case of Gould vs. Hudson River Railroad Company (6 N. Y., 522), decided in 1852, it was held that, as the owners of the land adjoining a navigable stream or river have no right of property in the waters of the river, they are not entitled to compensation when a railroad, constructed under a grant from the legislature along the shore between high and low water mark, cuts off all communication between such lands and the river, otherwise than across the road."

This decision, together with the case of the Duke of Buccleuch vs. The Metropolitan Board of Works, L. R., 5 Ex., 221, furnished

almost wholly the authority upon which Stevens vs. Patterson & Newark R. R. Co., 34 N. J., 532, was decided in 1870. But in 1872 the case of the Duke of Buccleuch was overruled, and the principles here contended for fully approved (L. R., 5 H. L., 418), and again, in 1876, the doctrine was repeated and extended in the leading case of Lyon vs. Fishmongers Co., 1 App. Cas., 662. Moreover, Gould vs. Hudson R. R. Co. and Stevens vs. Patterson, etc., were decided before Yates vs. Milwaukee was decided in this Court.

While in Tomlin vs. Dubuque R R. Co., decided in 1871, in 32 Iowa, 106, which supports the Gould decision, and which was decided shortly after Yates vs. Milwaukee and prior to the above cited English cases, no reference is made to Yates vs. Milwaukee and the Gould case is followed. However, this Gould case which has been such a stumbling block to other Courts and which appears to have been the strongest ground work for all the decisions which have opposed the doctrine here contended for, was by the same Court, in April, 1892, fully overruled in Rumsey vs. N. Y. R. R., 30 N. E. Rep., 654, and the principles of Yates vs. Milwaukee adopted.

In speaking of the Gould case, the Court there says: That since the decision of the Gould case in 1852, this question and questions of a kindred nature, have been elaborately examined, discussed and settled in this Court, in our highest federal tribunal, in the Court of last resort in England, and in the highest Courts of several of our sister States. The doctrine of that case has been repudiated or ignored in their decisions, and the right of proprietors of lands upon rivers and public highways has been determined upon principles more in accord with reason and justice."

The decisions of New Jersey and Iowa, based upon the Gould case, so outraged the public feeling of natural justice, that the legislature speedily recognized the rights of access and mitigated the hardships of the rule by statutes giving compensation to riparian owners for the destruction of their rights of access.

Public laws of Iowa, 1874 page 28.

In view of all these facts, we think we may fairly contend that

New Jersey and Iowa courts would not repeat the Stevens and Tomlin decisions, in the light of the learning embodied in the recent cases. We have seen that the states which have been misguided through the Gould decision, either through an enlarged apprehension or legislative wisdom are now in line with the principles contended for in this intervention. It is reserved for the State of Washington in the flood light of all modern learning and research, to deny argumentatively the existence of littoral and riparian rights, and to base its decisions upon the Tomlin case from Iowa, Stevens from New Jersey, Gould from Mew York and Wood on Nuisances, this last authority being chiefly important for its learning and defense of the Gould decision in which he has found it necessary in order to sustain his conclusions to attack the opinion of the highest court of the civilized world. See Eisenbach vs. Hatfield 2 Wash. St. Rep. 236-251.

With the Gould case reversed, and the foundation of the Tomlin and Stevens cases thereby torn away, it would seem that the decision of the Supreme Court of Washington rested on nothing broader than the *dixit* of the Court.

With littoral rights incident and appurtenant to upland, passing by a government patent, as appears from the concensus of opinion from all the cases cited, it is respectfully submitted that intervenor is deprived of a right and privilege claimed under the land laws of the United States within section 709 of the Revised Statutes.

Gould on Waters (1st Ed.) sec. 240.

Illinois Central R. R. Co. vs. State of Illinois 12 S. Ct. Rep. 115. Gould on Waters sec. 148.

Lewis on eminent domain, in section 78, after discussing the principles of the Gould case, says: "There are cases which hold that the riparian owners, upon waters the bed of which belongs to the public, have valuable rights appurtenant to their estates, of which they cannot be deprived without compensation. This seems to us the better and sounder rule. The opposite conclusion has been reached by a narrow and technical course of reasoning, based upon the fact that the title to the shore is in the State for the public. It is assumed that this title gives to the State the same abso-

lute and exclusive control of the waters and their bed as an individual possesses over his private property. But there is really no analogy between the relation of a riparian owner to the water upon which he abuts, and the relation between the proprietors of adjoining lands. The State holds the title to the public waters as a trustee, merely for use of all the public in common. The very object in declaring the title in the public is the better to secure this common right and benefit. The riparian owner is peculiarly situated for the enjoyment of these advantages. He has rights in the waters upon which his land abuts which no private owner has in the lands of his neighbors. No private owner holds his land for the purpose of being used by his neighbors and the public. The conclusions, therefore, which are based upon the purely artificial and metaphysical notion of title carried to its extreme logical consequences, as in the case of ordinary ownership, are, it seems to us, unsound and unwarranted. As a matter of fact, riparian owners have always enjoyed, in connection with their estates, various privileges in the contiguous shore and waters and practically these privileges have been regarded as annexed to the estates and estimated as part of the property in business transactions touching the same. When a court is called upon to say whether these privileges are rights appurtenant to the estate and part and parcel of it, it must establish a rule of law and property, which ever way it decides the question. To look simply to the fact of title and then apply the law relating to adjoining proprietors, is to ignore some of the most important features of the case. True the title is in the state, but it is only in the state by the declaration of the courts, and then only as trustee for the benefit of all the public in common, including the riparian owners. And, on looking further, it is seen that the riparian owner, in addition to rights which he shares in common with others, has other rights or privileges which are peculiar to himself, such as the right of accretion, the right of wharfage, the right of access to and from his lot, and the like, which destroy all analogy to the case of adjoining proprietors. It is more reasonable, more logical and more just to say that the privileges are in fact rights, as inviolable as the soil itself. The public loses nothing, for it is conceded that all these rights are subject to a paramount right of the state to use and improve the waters as shall best subserve the common right of all."

In Stevens vs. Patterson & Newark R. R. Co. (34 N. J. L., 532-562) the chancellor, in his dissenting opinion, says, first:

"The owner of lands, upon tide waters, has a right to the natural advantages conferred on his land by its adjacency to the water, which * * * is an incident to the land and is property."

Second. "That the right to wharf out from the land situate on the tide waters over the shore in front, has become an incident to such lands, and is property."

Lastly. "That all these rights being incident to an estate which add to its value, are property and cannot be taken away by general or special legislation, except by the powers of eminent domain for public use, and upon just compensation."

In Yates vs. Milwaukee this Court said: "This riparian right is property and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

In Diedrich vs. N. W. R. R. Co., 42 Wis. 248, the Supreme Court said: "But, while the riparian owner only takes to the water line, it by no means follows, nor are we willing to admit, that he can be deprived of his riparian rights without due compensation. As proprietor of the adjoining lands and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place; he has the right to build piers and wharves in front of his land, out to navigable waters, in aid of navigation, not interfering with the public use. These are private rights, incident to the ownership of the shore, which he possesses distinct from the rest of the public. All the facilities which the location of the land with reference to the lake affords, he has the right to enjoy for the purpose of gain or pleasure; and they often times give to property so situated its chief value. It is evident from the nature of the case, that these rights of uses and of exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress. It seems un-

necessary, to add to these remarks, that these riparian rights are not common to the citizens at large, but exists as incident to the right of the soil itself adjacent to the water. In other words, according to the uniform doctrine of the best authorities, the foundation of the riparian rights, ex vi termini, is the ownership of the bank or shore. In such ownership they have their origin. They may and do exist, though the fee of the bed of the river or lake be in the state. If the proprietor owns the bed of the stream or lake, this may possibly give him some additional rights; but his riparian rights, strictly speaking, do not depend upon that fact."

Olson vs. Merrill, 42 Wis., 203.

Boorman vs. Sunnuchs, 42 Wis., 233.

In Union Depot etc. Co. vs. Brunswich, 31 Minn., 297-301, the Supreme Court held: "In this state, it is the settled doctrine that the riparian owner has the fee to low water mark; But while he only has the fee to low water mark, he has certain rights incident to the ownership of land bordering on a navigable stream. Among these rights are the right to enjoy free communication between his abutting land and the navigable channel of the river, to build and maintain suitable landings, piers, and wharves, on and in front of this land, and to extend the same into the river to the point of navigability, even beyond low water mark; and, to this extent, exclusively to occupy, for such and like purposes, the bed of the stream, subordinate only to the paramount right of public navigation. These riparian rights are property, and can not be taken away without paying just compensation therefor."

Hence, since the intervenor has littoral rights, incident to his upland, arising out of a Federal grant, under the land laws of the United States, and these rights are valuable property, and became invested in the intervenor, while Washington was a territory and before the filing, by Mr. Baer, of this scrip, it is submitted that the Federal government could not grant by a subsequent patent, the portion of the tide flats, lying in front of intervenor's upland, and thereby segregate, cut off, and destroy his right of egress and ingress to and from his said upland, touching upon navigable waters, out from and across the tide-flats herein involved to the point of deep

navigable waters of Puget Sound; as such a grant would take away and confiscate a part of the property right, privilege and title, which was conveyed to intervenor, without compensation, and in violation of the constitution of the United States. Particularly so, since this right is conceded by the weight of authority to be as inviolable as the title to the soil of the upland, subordinate only to the public right of navigation.

If it were conceded that the government could grant title, through the Valentine act, to filings placed upon the shores of Puget Sound, then it is possible for the government to peel off the shore of the State of Washington from the British boundary to the State of Oregon, and surrender over the water front of this State, and the many million dollars of valuable improvements standing thereon, to the selfish ends of the few private individuals who have filed their scrip over the entire water front of all of the chief cities in the State of Washington upon Puget Sound.

Should this application and the others on file prevail, the cities of Seattle and Tacoma will be encompassed by an enemy teeming with the selfishness of individual gain and at the mercy of certain land speculators upon whose license must depend the enjoyment of those industries which have made them what they are and upon the continuance of which depend their very existence. A decree depriving the city of Seattle of the control of its water-front, would "cut off from all access to navigation the first commercial city of the Northwest; shut up her streets, render her wharves useless; and worse than an invading enemy, invest her with a blockade that her valor can never raise."

New Orleans vs. The United States, 10 Peters, 662.

Wherefore we respectfully submit the decision of the lower court should be sustained.

JOHN PURINTON FAY,
Attorney for Intervenor, George F. Dearborn.

APPENDIX.

PROVISIONS OF THE CONSTITUTION OF THE STATE OF WASHINGTON.

ARTICLE I.

DECLARATION OF RIGHTS.

Section 16. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across, the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into the court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.

Article XVII., tide lands. Section 1. The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes; *provided*, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

Article XV, harbors and tide-waters. Section 1. The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays, and inlets of this State, whenever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof upon either side. The state shall never give, sell, or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than 600 feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce.

Sec. 2. The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks, and other structures, upon the areas mentioned in section 1 of this article, but no lease shall be made for any term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks, and other structures.

Sec. 3. Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided.

Article XXVII, Schedule. In order that no inconvenience may arise by reason of a change from a territorial to a state government, it is hereby declared and ordained as follows:

Section 1. No existing rights, * * * contracts or claims, shall be affected by a change in the form of government, but all shall continue as if no such change had taken place; * * *

Section 2. All laws now in force in the Territory of Washington which are not repugnant to this constitution shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature: *Provided,* That this section shall not

be so construed as to validate any act of the legislature of Washington Territory granting shore or tide-lands to any person, company, or any municipal or private corporation.

PROVISIONS OF THE STATUTES OF THE STATE OF WASHINGTON.

(Session Laws of 1889-90, pp. 431-7.)

AN ACT for the appraising and disposing of the tide and shore lands belonging to the State of Washington.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. The tide and shore-lands in the State of Washington shall be appraised, and the same shall be disposed of by the Commissioner of public lands as in this act provided, which are not by the constitution and laws of the State reserved from sale.

SEC. 2. There shall be a board of equalization, which shall be composed of five members, as follows: The secretary of state, the state auditor, and three qualified electors, residents of counties of this state in which no tide lands exist, who shall be appointed by the governor, and the same are hereby created a board of equalization and appeal as hereinafter provided, who shall serve for one year or until their successors are appointed and qualified.

SEC. 3. The governor shall appoint in each county of the state where shore and tide lands exist, a board of appraisers consisting of three disinterested resident freeholders, whose duty it shall be to examine and appraise the shore and tide lands in their respective counties, as hereinafter provided.

SEC. 4. For the purpose of survey and appraisal, the tide lands of the State of Washington are hereby divided into three classes. The first class shall embrace all tide lands situated within or in front of the corporate limits of any city, or within two miles thereof upon either side. The second class shall embrace all tide lands situated at a greater distance than two miles from either side

of an incorporated city or town, and upon which are located valuable improvements. The third class shall embrace all other tide lands. Tide lands of the first class shall be surveyed and appraised as rapidly as practicable, and the State Board of Equalization shall order such lands surveyed, as hereinafter provided. * * * (The rest of this section provides for the survey and appraisal of tide lands of the second and third classes.)

Sec. 5. Said board of appraisers shall meet at the county seat of their respective counties within thirty days after the location of the harbor lines in front of incorporated cities and towns, and, after taking an oath to support the constitution and the laws of Washington, and faithfully and impartially discharge their duties, shall organize by electing one of their number chairman and appointing a secretary. After the organization of the board as provided, they shall, within ninety days thereafter, examine, survey and appraise so much of the shore and tide-lands in their respective counties as lies within or in front of the corporate limits of any incorporated city or town, and within two miles thereof, upon either side, and thereafter, from time to time, such other lands as application to purchase may render necessary, classifying the same and fixing the valuation of each lot, block or tract separately, noting the improvements thereon and by whom claimed, and excluding the improvements from such valuation.

Secs. 6, 7. Provide for preparation and filing of appraisers' plats of the shore and tide-lands.

Sec. 8. Any person, association or corporation entitled to purchase or hold real estate in the state of Washington, who shall desire to purchase under this act, may file with the commissioner of public lands an application to purchase any of the lands herein described, which application shall contain a description of the land applied for by metes and bounds. The commissioner of public lands shall furnish the state board of equalization and appeal with a true copy of said application. Upon receipt of said application the commissioner of public lands shall, at the expense of the applicant, publish for three weeks, in any newspaper printed in the county in which the land is situated, a notice of such application to purchase, with a description thereof. If, at

the expiration of thirty (30) days, no notice of contest is filed with the said state board of equalization and appeal, said appraisement shall stand confirmed and be the price at which said land shall be sold, as hereinafter provided.

Sec. 9. Provides for contests as to right to purchase, etc.

Sec. 10. Provides for issuing of certificates to purchase.

Sec. 11. The owner or owners of any lands abutting, or fronting upon, or bounded by the shore of the Pacific Ocean, or of any bay, harbor, sound, inlet, lake or watercourse, shall have the right for sixty (60) days following the filing of the final appraisal of the tide-lands to purchase all or any part of the tide-lands in front of the lands so owned: *Provided*, That if valuable improvements in actual use for commerce, trade or business have been made upon said tide-lands by any person, association or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid:

Provided further, That the occupant who has, prior to the passage of this act, planted oysters in any bay or arm of the sea upon ground not covered with natural oysters, or who has, prior to the passage of this act, acquired by purchase the rights of any other person or corporation to such occupancy, the same being not within, nor in front of, the limits of any incorporated city or town, or within two miles on each side thereof, shall have the exclusive right to purchase the land so occupied for the period aforesaid to an extent not exceeding eighty (80) acres; *Provided*, That nothing in this act shall be so construed to apply to any improvements made after the passage of this act.

Sec. 12. When the abutting upland owner has attempted to convey by deed to a *bona fide* purchaser, any portion of the tide-lands in front of such uplands, or *littoral rights* therein, such right of purchase herein given to the upland owner shall be construed to belong to such purchaser, or to any person, association or corporation claiming by, through or under such purchaser, to the extent of the tract or rights so conveyed.

Sec. 13. In case the persons mentioned in sections eleven and twelve of this act do not, within the time limited, exercise the right

to purchase herein given, then said lands shall be opened to the public for sale as herein provided. * * * (The rest of this section prescribes the mode of public sale.)

(Session Laws of 1889-90, pp. 239-40.)

AN ACT to create a board of harbor line commissioners, prescribing their duties and compensation.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. There is hereby created a board of harbor line commissioners, to consist of five disinterested persons to be appointed by the governor.

SEC. 2. The said commissioners shall hold office until the 15th day of January, 1893. Should a vacancy or vacancies occur in said board, by resignation or otherwise, the same shall be filled by appointment of the governor.

SEC. 3. The duties of the said harbor line commissioners shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this State, wherever such navigable waters lie within or in front of the corporate limits of any city or within one mile thereof upon either side, and to perform all other duties provided and prescribed in Article 15 of the constitution of the State of Washington, and all such other duties as the law may prescribe, and wherever and whenever said board of harbor line commissioners shall have established the lines as herein provided, in any of the navigable waters of the harbors, estuaries, bays and inlets of this State, they shall file the plat thereof in the office of the secretary of state, and a duplicate thereof in the office of the clerk of the city or town where harbor lines shall have been located, and from and after the filing of said plat, the harbor lines established as therein and thereon designated and displayed shall be, and the same are declared to be, the harbor line of that portion of the navigable waters of this State.

SEC. 4. The board of harbor line commissioners, hereby created, shall begin operations as soon as may be practicable, and are hereby authorized to employ a clerk, a competent surveyor, and such

assistance as may be necessary, and to purchase such material and supplies as may be necessary to carry out the full intent and purpose of this act, at such rates of compensation as they may deem adviseable. To carry into effect the provisions of this act, the sum of six thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of the tide-land funds in the state treasury not otherwise appropriated.

Secs. 5-7. Not responsive.

Approved March 28, 1890.

(Session Laws of 1891, pp. 405-6.)

An act relating to the improvement of harbors and waterways of the State of Washington, and providing funds therefor.

Be it enacted by the legislature of the State of Washington:

Section 1. That seventy-five (75) per cent. of the proceeds derived by the state from the sale of tide lands within the limits of any incorporated city or town in the State of Washington, or within one mile on either side thereof, shall be, and the same is hereby, appropriated and shall be set apart as a special fund by the state treasurer for the construction and maintenance of a system of permanent and substantial improvements in aid of commerce and navigation in and for the harbor of such city or town wherein such tide lands may be sold, and the remaining twenty-five (25) per cent. shall be paid into the general tide land fund of the state.

Sec. 2. Wherever harbor lines are now, or may hereafter be, located and established within or in front of any incorporated city or town in the State of Washington, the harbor line commission is hereby authorized and directed to approve and adopt, subject to the approval of the Secretary of War, or an advisory board created by the Secretary of War, as soon as may be practicable, such a system of harbor improvements, within the harbor line strip for each harbor wherin such lines may be located and established, as will conform as nearly as practicable to any permanent improvements constructed or under construction therein as in their judgment, and upon the available advice of competent engineers, shall be

best calculated to promote the permanent commercial welfare thereof; and all funds appropriated for the purposes of harbor improvements under the foregoing section of this act, or otherwise, shall be expended under the direction, supervision and control of the harbor line commission of the State of Washington, and the State auditor is hereby directed, upon the filing of vouchers approved by the harbor line commission, to draw warrants on the State treasurer, payable out of the several harbor improvement funds, and the State treasurer shall pay all said warrants out of said funds.

Secs. 3, 4. Not responsive.

Approved March 10, 1891.